[2023] IEHC 157

THE HIGH COURT
JUDICIAL REVIEW

2021 No 88 JR

Between

SHADOWMILL LIMITED

Applicant

and

AN BORD PLEANALA

Respondent

and

LILACSTONE LIMITED and DUBLIN CITY COUNCIL

Notice Parties

JUDGMENT OF MR JUSTICE DAVID HOLLAND DELIVERED 31 MARCH 2023

Contents

INTRODUCTION[1]

1. The Applicant ("Shadowmill") seeks to quash the Respondent Board's ("the Board") decision of 16th December 2020 to grant planning permission[2] (the Impugned Permission) to the 1st Notice Party ("Lilacstone") for 18 apartments at the 0.27-hectare site of "Stone Villa", 297 North Circular Road, Phibsborough, Dublin ("the Permitted Development" and "the Site").

2. Stone Villa is a 19th century three-storey[3], three-bay, stone-faced, detached house with a two-storey rear return. It is a Protected Structure.[4] Its curtilage constitutes the Site. It is on the northern side of North Circular Road. The house is derelict and in very poor condition. The Site and the development for which permission was sought are illustrated in Figures 1 and 2 below.

3. The Dublin City Development Plan 2016-2022 (the "Development Plan") applies and the zoning objective for the area seeks to protect, provide, and improve residential amenities.

4. Lilacstone acquired the property in or about 2019 and sought permission (the "Planning Application") in November 2019 from Dublin City Council ("DCC"), for a development of 32 Apartments: 3 in renovations to Stone Villa (1 on each floor); 15 in Block A; 14 in Block B. Blocks A & B were to be of four storeys each (the "Proposed Development"[5]). Block A is just behind Stone Villa and Block B was to be behind Block A, at the rear of the site. The application envisaged, inter alia, widening the existing vehicular entrance from North Circular Road, hard and soft landscaping; pedestrian access, boundary treatments and balconies (facing all directions) and provision of public open space.

5. DCC refused permission. On Lilacstone's appeal, the Board granted the Impugned Permission.

1 As is normal, headings in this judgment are for general navigational assistance only. They are not part of the operative judgment and do not delimit the content of the text follows them.
2 ABP Ref 306681-20.
3 The return is 2-storey.
4 Within the meaning of Part IV Chapter I PDA 2000.
5 I will use this phrase specifically as to the development proposed in the planning application, as opposed to that permitted.

6. The Impugned Permission refused permission for Block B but otherwise granted permission largely as sought.[6] The "on the ground" significance of the omission of Block B will be, at least generally, apparent from Figures 1 and 2 below. No drawing or other illustration exists of the entire Permitted Development – i.e. omitting Block B or depicting what landscaping will take its place. But drawings exist of all that is to be developed.

Figure 1 – The Site and Proposed Development

- This is a ground floor plan but serves to depict the Site generally. The Site is outlined in red.
- The North Circular Road runs along the southern Site boundary.
- The yellow building at the "bottom" (south) of the layout is Stone Villa. Block A is the red, blue and orange building immediately behind it. Block B is the purple and orange building at the "top" of the layout.

6 Some additional changes were conditioned but are not of present consequence.

- The Cherrymount residential development lies on the western boundaries of the Site. The Cherrymount houses adjacent Stone Villa and Block A have shorter gardens than those adjacent Block B.
- The Phibsborough Luas stop is close by to the east.

Figure 2 – Proposed Development

- Stone Villa is the white building in the bottom right. Block A is behind it. Block B is behind Block A at the top of the figure.

7. Lilacstone did not submit an EIA Screening Report or EIAR. It did submit a Landscape Masterplan[7] to the effect, inter alia, that the proposed open space layout was determined by advice from heritage consultants and based on the original layout illustrated on historic mapping. The proposed layout west of 'Stone Villa' is described as broadly reinstating the historic layout.

8. Lilacstone also submitted a Conservation Assessment[8] (the "Goodbody Conservation Report") based on an inspection of 10 June 2019. Stone Villa was in situ, at lates, by 1849. It is described as "*an imposing house, though surprisingly modest in size. Its position on North Circular Road, set back from the street on a wide site, together with its height and stone front, give it an air of significance despite having just two rooms on each floor in the main house and a return of modest proportions*". The small rear rooms on each floor and in the rear return were blocked off and inaccessible. The internal fittings and decorative features are also of a relatively modest quality and the staircase is likely not the original – it is late 19th or early 20th Century. By way of conservation

7 Including drawing no. BWF-JBAI-00-00-DR-L-0001.
8 Dated 4 November 2019.

assessment it is said that, whereas a 2017 planning permission allowed extension of Stone Villa to the side and rear, the Proposed Development "*does not include any addition to the side of Stone Villa, leaving it as a freestanding building. As a result, the view of the house from the street frontage on North Circular Road will be respected and there will be minimal impact on the character and setting of the protected structure*." The assessment describes Stone Villa as in "*extremely poor condition and is in need of urgent attention and also needs to be brought back into use as quickly as possible*".[9] It includes a description and photographs of the exterior and interior of Stone Villa which confirm its dereliction and poor condition - including structural condition. The assessment describes the intended internal works in general terms – primarily functional rather than conservational, though conservation is addressed. It is asserted that the works will allow repairs with minimal impact on the interior and exterior character of the house, leaving Stone Villa as a stand-alone building.

9. Shadowmill describes itself as an NGO dedicated to the protection of the built and natural environment in Phibsborough. It made a submission to the Council in the planning application and to the Board in Lilacstone's appeal. In that appeal, Shadowmill adopted, inter alia, a 20-page submission by "Future Analytics[10]" for local residents. Future Analytics said its clients had no desire to see the lands remain derelict but considered that the Proposed Development would be worse for the area than is the Site in its current condition. It adopted the Council's reasons for refusal.[11] Broadly, it complained of excessive and overbearing scale, disproportion, height, density, massing and bulk, proximity to boundaries, over-looking and site coverage and of resultant adverse impact on the residential amenity, including privacy, of local residents. It complained of negative effect on Stone Villa as a Protected Structure and of excessive tree-removal.

The Council's Refusal

10. The Council in January 2020 decided to refuse permission for the following reason:[12]

> *"Having regard to the constricted nature of the application site and the layout of the proposed development in terms of the height and location of the proposed blocks within close proximity to the boundaries of the site, it is considered that the proposed development would have an adverse impact on the residential amenity of occupants of properties on Cherrymount Park, Cabra Road[13] and Saint Peter's Avenue (Cabra Villas)[14] by way of significant overshadowing and excessive levels of overlooking.*

9 P23.

10 Shadowmill's submission to the Board (Exhibit GF1.10a) was dated 16 March 2020 and adopted the submission on behalf of the residents of Cherrymount Park and neighbouring roads by Richard Hamilton of "Future Dynamics". In fact the submission to the Board on behalf of "Cherrymount Park, North Circular (NCR) and St Peter's Avenue residents, Dublin 7" was dated 18 March 2020 and was made by "Future Analytics Consulting Ltd." and was signed by Richard Hamilton (Exhibit GF1.10b). The nature of the error is obvious, and nothing turns on it.

11 See below.

12 I have altered layout of text for ease of exposition.

13 North of the site.

14 Northeast of the site.

It is further considered, having regard to the height and proximity to shared boundaries, that the development will have an overbearing and obtrusive appearance for occupants of adjacent dwellings and has an adverse impact on the setting of the Protected Structure.

The proposed development would therefore, seriously injure the amenities of property in the vicinity, be contrary to the provisions of the City Development Plan 2016-2022, and to the proper planning and sustainable development of the area."

11. This reason for refusal was that recommended in the Council's Planner's Report - which had advised[15] that the proposal was not "*in compliance with*" Development Plan §16.3.4 *'Public Open Space - All Development'* and §16.10.3 *'Residential Quality Standards - Apartments and Houses'.* Inter alia, this related to concerns as to Landscaping and Open Space as follows:

"While it is noted that the applicant is proposing an area of public open space which exceeds the Development Plan requirement, the Planning Authority has concerns relating to the suitability and location of the proposed public open space and the potential impact the public open space may have on the residential amenity of the proposed apartment units.

It is considered that the most suitable area for public open space is to the front of 'Stone Villa' which is directly accessible from the North Circular Road.

The Planning Authority is concerned that the use of the open space to the side and rear of Blocks A and B for the general public may have a negative impact on the residential amenity of potential occupants of the apartment units having regard to the restricted nature of the site and potential implications on the privacy and security of future residents.

In addition the areas to the rear of Blocks A and B are not considered to be genuinely accessible for the general public and largely comprises circulation routes as opposed to meaningful open space for the purposes of active and passive recreation.

An alternative landscape strategy for the subject site having regard to the requirement to provide communal open space for the proposed apartment units and to provide a public open space which meets the required quantum, is genuinely accessible to the public and clearly define what is private, communal and public space.[16] The landscape plan for the subject site should provide clear demarcation between private, communal and public open space."[17]

12. It is apparent from the Board's Inspector's report that the Council's concern as to "severe" overlooking/overbearing adjacent homes was more acute as to Block A than Block B.[18] Also, the

15 Subheading: Landscaping, Communal, Public and Private Open Space.
16 Sic.
17 The Council's reason for refusal did not explicitly deploy the phrase "*material contravention of the Development Plan*". The Board takes the position that the Council's refusal does not conclude that the Proposed Development would "contravene", or indeed "materially contravene" the Development Plan. Given the abandonment of Ground 5 (see below) this is no longer of consequence.
18 Inspector's Report p8.

Conservation Department considered that Block A was too close to Stone Villa and deprived it of a rear garden of appropriate size.[19]

Lilacstone's appeal

13. Lilacstone's appeal[20] to the Board suggested an amended proposal ("Option B"). It would reduce the Proposed Development by 9 units to 23 by removing a middle storey from each of Blocks A and B - thereby reducing them to 3 storeys from 4 - while retaining the set-back top floor[21] and resulting in 10 apartments in each of Blocks A and B.[22] Lilacstone did not withdraw its original proposal - Option B was presented as an alternative.

Grounds & Affidavits

14. Shadowmill abandoned Grounds 1[23] and 5.[24] The Core Grounds on which relief is sought are as follows:

> 2. Failure to conduct any or adequate assessment for EIA purposes.[25]
>
> 3. "*The Board did not have jurisdiction to attach Condition 2*" to the Impugned Permission. [It excised Block B.]
>
> 4. "*The Board did not have jurisdiction to grant permission*" where Lilacstone failed to provide any or adequate detail as to boundary treatment or interior conservation proposals in respect of the Protected Structure.

I will address the particulars of those grounds below.

15. The parties' affidavits are merely formal – verifying pleadings and exhibiting documents – save as described below.

19 Inspector's Report §3.2.5.
20 §5.1.
21 See pages 49/50 of the Appeal and Board's Inspector's Report §§2.1 & 8.1.1.
22 Option B also proposed alterations to the balcony/terrace in the north elevation, screening and entrances.
23 The impugned decision is invalid because the Board erred in failing to have any, or any adequate regard for the protection of bat fauna for the purposes of Annex IV and Article 12 of the Habitats Directive and/or section 23 of the Wildlife Act 1976 (as amended).
24 Alleged non-compliance with S.37(2)(b) PDA 2000 having regard to material contravention of the Development Plan by reason of alleged overshadowing and loss of privacy for neighbouring properties, absence of provision for communal public space and inadequacy of the public open space provision.
25 Environmental Impact Assessment pursuant to Directive 2011/92/EU On The Assessment Of The Effects Of Certain Public And Private Projects On The Environment As Amended By Directive 2014/52/EU.

Affidavit of Bernadette O'Connell – 28 March 2022 – for Lilacstone

16. Ms O'Connell identifies herself merely and uninformatively as a "*consultant*" of JBA Consulting Engineers and Scientists Limited[26] ("JBA") and states that JBA did a *"preliminary bat roost survey, followed by a bat emergence and static surveys".* She regrettably omits to state her particular discipline or expertise. The Bat Report itself identifies her as the relevant JBA Project Manager but it is not apparent what that actually involved as she neither prepared not reviewed the report. However, no objection was taken to her evidence on those accounts.

17. Ms O'Connell corrects an error in JBA's Bat Survey Report – the static survey was done in September, rather than July, 2019. But she says the error and the correct position are reasonably clear as the report records that JBA were first instructed in September 2019 and all the other survey dates were in September 2019 and Figures 3-1 and 3-2 record the dates correctly, as does the List of Figures. I accept that is so. However I note that JBA was retained, at most, only 2 months before the planning application was made. Why that is so is unexplained.

The Earlier Permission

18. Of some contextual note is that the DCC Conservation officers[27] record a 2016 planning permission[28] for a new 3-storey extension to the west side and rear of Stone Villa, a ground floor terrace & balconies at first & second floor levels to the front of the new extension and renovation of Stone Villa to six 2-bed apartments and six 4-bed three-storey houses to the rear of Stone Villa. The Inspector's report does not record the expiry date of that permission – but it was "*extant*" in October 2020 at the time of that report.[29]

INSPECTOR'S REPORT

19. The Board's Inspector, in her report dated 12 October 2020[30], had regard to both the Proposed Development for which permission was originally sought and refused by the Council and to Option B.[31]

26 Practice registered with the Chartered Institute of Ecology and Environmental Management.
27 Report considered below.
28 An Bord Pleanála 247378 - DDC ref 4313/15
29 §§4.2 and 8.3.7.
30 Likely delayed by the Covid pandemic.
31 Inspector's Report §8.1.1.

Residential Development

20. The Inspector favoured the principle of restoration of Stone Villa and residential multi-storey apartment development on the Site.[32] The proposed building heights were deemed acceptable in principle.[33] However, she found significant issues as to scale, layout and physical interface with surrounding development on a constrained site.[34] The inspector considers omission of Block B:[35]

> *"The Board could seek a revised design and invite further submissions. While it may be an option to omit Block B by condition this would not be satisfactory in terms of lands use. In the absence of revised design I consider it appropriate to refuse permission on the basis of impact of Block B on residential amenity."*

EIA[36]

21. On 25 July 2020 another official of the Board[37] completed a form entitled "EIAR Pre-Screening – EIAR Not Submitted" ("EIAR Pre-Screening Form"). It recorded, in error, that a Preliminary Examination for EIA was not required. I will consider this issue further in due course. The Inspector refers to the EIAR Pre-Screening Form without comment. Though she did not expressly say so in her report, it is clear that, fortunately, the Inspector realised that the EIAR Pre-Screening Form was in error. Despite the Form's recorded conclusion that Preliminary Examination was not required, the Inspector in fact herself did,[38] and reported to the Board, a Preliminary Examination. She concluded that EIA was not required. Although not explicitly so expressed, it is common case that the "*preliminary examination*" explicitly done was done pursuant to **Article 109(2)(a) PDR 2001**[39] to the effect that, owing to the *"nature, size and location of the development",* EIA was unnecessary.[40] The inspector records under the heading "EIA Screening"[41] her view that:

> *"Having regard to the size of the development site which is less than 0.3 hectares and the scale of the development which amounts to 32 units together with the developed nature of the receiving environment and to the nature, extent, characteristics and likely duration of potential impacts, I am of the opinion that the proposed development is not likely to have significant effects on the environment and the submission of an environmental impact statement is not required. The need for the environmental impact statement[42] can, therefore, be excluded at preliminary examination.*

32 Inspector's Report §8.2.2.
33 Inspector's Report §8.2.4.
34 Inspector's Report §8.2.7.
35 Inspector's Report §8.5.5.
36 Inspector's Report §7.
37 Though not stated in her report, the Inspector has since stated on affidavit that the EIAR Pre-Screening Form was completed by another Board official prior to her getting the file.
38 She has confirmed on affidavit that she herself did the Preliminary Examination described in her report.
39 Planning and Development Regulations 2001 as amended. Article 109(2) Substituted by article 69(b) of S.I. No. 296/2018 - European Union (Planning and Development)(Environmental Impact Assessment) Regulations 2018.
40 Shadowmill written submissions §8.
41 §7.
42 More precisely the conclusion should be that EIA was not required, but the position is clear.

A preliminary examination form has been completed and a screening determination is not required."

Bats[43]

22. The Inspector does not refer in her Preliminary Examination to the presence of bats and potential bat roosts on Site – despite the fact that all bat species are protected by the Habitats Directive. Other than noting that the issue of effect on species was raised by objectors[44], the inspector's entire and laconic treatment of bats appears under her "*Assessment – "Other Issues*" and reads as follows:

"Bats: Three species were identified during the survey work which forage in the site. Mitigation measures are proposed including roost boxes and light survey to minimise disturbance and I consider this to be adequately addressed."[45]

Stone Villa & Curtilage

23. I will consider the Inspector's report as to the Protected Structure (which includes its curtilage) below in considering Ground 4. In summary, the Inspector was satisfied that conversion of Stone Villa to 3 apartments was appropriate in principle (no-one disagrees). She accepted the concerns of DCC's Conservation Officers that details of the current state of Stone Villa and of the proposed works needed clarification. However, unlike DCC's Conservation Officers, who advised a regulatory further information request,[46] she considered that the details could be got by planning condition. She did not consider it reasonable to refuse permission on the basis of impact on the Protected Structure by reason of intervention to the structure or impact on its curtilage. She did not draft such a condition, and none ensued in the Impugned Permission.

Conclusion & Recommendation to Refuse

24. The Inspector's conclusions are as follows:[47]

- Given the Site's strategic location and the desirability of developing it for housing, a degree of latitude is needed.
- The conversion of the house to 3 units is highly desirable.

43 Inspector's Report §8.11.1.
44 The inspector does not identify the species, but the Future Analytics report recorded that observations submitted to Dublin City Council asserted, inter alia that "The development will completely destroy this area as a habitat for bats".
45 Inspector's Report §8.11.1.
46 Not made as DCC refused permission.
47 Inspector's Report §8.13.

- There is a fundamental issue with the overall Site configuration and layout - particularly as to Block B.
- The narrowness of part of the Site and the retention of the Protected Structure and its curtilage constrains development of the Site.
- The issue is the narrowness of the Site and overlooking. The Site is in effect unduly intrusively borrowing from the adjacent curtilages. The Proposed Development would be injurious to amenity principally by reason of proximity to the boundary and proposed height at or close to multiple boundaries.
- The Proposed Development would be a retrograde step in terms of building form and scale of development. Its layout and scale, so close to multiple boundaries, would result in substandard development and have unacceptable impacts on surrounding property.

25. The Inspector's concerns were greater as to Block B than Block A:[48]

"The Board could seek a revised design and invite further submissions. While it may be an option to omit Block B by condition this would not be satisfactory in terms of lands use. In the absence of revised design I consider it appropriate to refuse permission on the basis of impact of Block B on residential amenity."

26. The Inspector recommended[49] refusal of permission for the following reasons:

- *1 "…… in close proximity to the surrounding housing to the east and west could[50] be visually overbearing and intrusive and would seriously injure the residential amenities of these properties. The proposed development would therefore be contrary to the zoning objective … to protect, provide, and improve residential amenities …".*

- *2 "….. on a constrained site in close proximity to boundaries and reliant on extensively enclosed terraces and balconies would not provide for an adequate standard of development with regard to access to light and amenities and would therefore seriously injure the residential amenities of future occupants and would be contrary to [Development Plan] policy … which seeks to provide for high-quality housing".*

- It *"……. would therefore be contrary to the proper planning and sustainable development of the area".*

48 Inspector's report §8.5.2 et seq & §8.6 & 8.9.1. Contrary to the view of DCC.
49 Inspector's report §9.0.
50 On a conspectus of the Report I think that, here, "could" may fairly be read as "would".

IMPUGNED PERMISSION

27. By its Impugned Decision of 16th December 2020, the Board disagreed with the Inspector and granted permission for a modified form of the Proposed Development ("the Permitted Development") - in what it colloquially calls a "split decision".[51] The Impugned Permission permits redevelopment of Stone Villa and Block A in accordance with the original planning application but refused permission for Block B. It did not adopt Option B. The primary operative part of the Impugned Decision reads as follows:[52]

> *"GRANT permission for the conversion and renovation of 'Stone Villa', a Protected Structure, to accommodate three number apartments and the construction of one number, four storey apartment block (Block A), to accommodate 15 number apartments in accordance with the said plans and particulars based on the reasons and considerations marked (1) under and subject to the conditions set out below.*
>
> *REFUSE permission for the construction of a four storey apartment block (Block B), to accommodate 14 number apartments at the rear of the site based on the reasons and considerations marked (2) under."*

28. The Board under the heading "Matters Considered" states, and states only:

> *"In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions."*

It is surprising to find this formula used as late as December 2020 given that a year earlier, in **Balz #2**,[53] the Supreme Court had deprecated a similar formula as to be *"charitably … dismissed as little more than administrative throat-clearing before proceeding to the substantive decision, it has an unfortunate tone, at once defensive and circular. If language is adopted to provide a carapace for the decision which makes it resistant to legal challenge, it may have the less desirable consequence of also repelling the understanding and comprehension which should be the object of any decision."* However, nothing of the outcome of this case turns on that observation.

Grant - Stone Villa & Block A

29. The Board stated "*Reasons and Considerations (1)*" – as to the Permitted Development - as follows:

51 The phrase "split decision" describes not (as one might imagine) a disagreement of the Board's members but a combination of part-grant and part-refusal of the application.
52 I have altered layout of text for ease of exposition.
53 Balz v. An Bord Pleanála [2019] IESC 90 (Supreme Court, O'Donnell J, 12 December 2019).

"Having regard to the policies and objectives of the Dublin City Development Plan 2016-2022, the zoning objective for the site, the proposal for the renovation and refurbishment of the protected structure, the scale and design of the proposed "Block A" apartment building on an infill site in close proximity to public transport in a well serviced urban area, it is considered that subject to compliance with the conditions set out below, the proposed development[54] would not seriously injure the visual or residential amenities of the area and would therefore be in accordance with the proper planning and sustainable development of the area."

30. The Board recorded that:

"In deciding not to accept the Inspector's recommendation to refuse the entire development, the Board considered that, the works proposed to renovate and reuse the protected structure, and the proposed design, scale and disposition on the site of Block A, would be in accordance with the objectives and policies of the city development plan on this well serviced urban infill site, and that the omission of Block B would remove any unacceptable impacts on surrounding property. The proposed development[55] would not seriously injure the residential or visual amenity of the area, and would therefore be in accordance with the proper planning and sustainable development of the area."

Block B – Refusal/Omission & Condition 2

31. As recorded above, the Impugned Decision explicitly refused permission for Block B. Yet, in duplication of that refusal, Condition 2 of the Impugned Permission commences: *"Block B shall be omitted in its entirety, …".* Given the refusal, I am unclear why this element of Condition 2 was imposed. Yet the intent and effect is clear.

32. The Board stated "*Reasons and Considerations (2)*" for its refusal of permission for Block B. These reproduced verbatim the Inspector's reasons for recommending refusal of the entire application, save that they apply here to Block B only. Essentially, Block B would be contrary to the proper planning and sustainable development of the area in that it would:

- be close to surrounding housing, would be visually overbearing and intrusive and would seriously injure their residential amenities. This would be contrary to the zoning objective to protect, provide and improve residential amenities.
- be on a constrained site close to boundaries and reliant on extensively enclosed terraces and balconies and would not provide for an adequate standard of development as to access to light and amenities. It would therefore, seriously injure the residential amenities of future occupants, contrary to Development Plan policy which seeks to provide for high-quality housing.

54 Clearly a reference to the permitted development.
55 Clearly a reference to the permitted development.

33. Condition 2 continues:

> *"……. and the area shall be landscaped in accordance with a comprehensive boundary treatment and landscaping scheme which shall be submitted to and agreed in writing with the planning authority, prior to commencement of development.*
>
> ***Reason:*** *In the interests of visual and residential amenity."*

Omission of Block B – Note on Interpretation of Impugned Permission as to Tree Removal

34. On the **XJS**[56] "*intelligent, informed, inexpert, layperson*" principle of interpretation of planning permissions, it seems to me to that refusal of permission for Block B necessarily implies refusal of permission of all works intended solely to facilitate construction of Block B. It seems to me that, on considering the exhibited drawings such a layperson would readily conclude that it is clear that, as Block B is to be omitted, the occasion for removal of and lateral reduction of trees in the northern section of the Site no longer arises and such removal and lateral reduction are therefore not permitted by the Impugned Permission. So, and given the Bat Report identified only trees in the northern section of the Site as potentially containing bat roosts, it follows that no question now arises of removal of bat roosts in trees pursuant to the Impugned Permission.

EIA

35. The Board did not explicitly address – either by Preliminary Examination or EIA Screening or by agreement or disagreement with the Inspector's report - whether EIA was required.

Condition 6 – Work on Stone Villa

36. Condition 6 of the Impugned Permission reads as follows:

> *"6. All works to the protected structure shall be carried out under the supervision and in accordance with the requirements of a qualified professional with specialised conservation expertise (RIAI Grade 2 or higher).*
>
> ***Reason:*** *To secure the authentic preservation of this protected structure and to ensure that the proposed works are carried out in accordance with best conservation practice."*

56 Re XJS Investments Limited - [1986] IR 750. See, for example, Ballyboden Tidy Towns Group v. An Bord Pleanála [2022] IEHC 7 §119 et seq.

GROUND 2 – EIA PRELIMINARY EXAMINATION

2 - Article 4.3 & Annex III, EIA Directive - Article 109(2) & Schedule 7, PDR 2001

37. **Article 4 of the EIA Directive**[57] provides for EIA Screening. Article 4.3, as amended in 2014, provides as follows:

> *"3. Where a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2,[58] the relevant selection criteria set out in Annex III shall be taken into account. Member States may set thresholds or criteria to determine when projects need not undergo either the determination under paragraphs 4 and 5[59] or an environmental impact assessment, and/or thresholds or criteria to determine when projects shall in any case be made subject to an environmental impact assessment without undergoing a determination set out under paragraphs 4 and 5."*

38. By the underlined words, the 2014 Amendment introduced the possibility of what one may inelegantly call pre-screening screening for EIA. Those underlined words are the EU Law source of the Irish law concept of Preliminary Examination.

39. I would add that **WWF/Bozen**,[60] in identifying as the objective of the EIA Directive *"…that no project likely to have significant effects on the environment, within the meaning of the Directive, should be exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive assessment, be regarded as not being likely to have such effects"* may require, as to

57 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment as amended by Directive 2014/52/EU.

58 2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through: (a) a case-by-case examination; or (b) thresholds or criteria set by the Member State. Member States may decide to apply both procedures referred to in points (a) and (b).

59 This is in substance a reference to EIA screening – Article 4(4)&(5) provide as follows.

"4. Where Member States decide to require a determination for projects listed in Annex II, the developer shall provide information on the characteristics of the project and its likely significant effects on the environment. The detailed list of information to be provided is specified in Annex IIA. The developer shall take into account, where relevant, the available results of other relevant assessments of the effects on the environment carried out pursuant to Union legislation other than this Directive. The developer may also provide a description of any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment.

5. The competent authority shall make its determination, on the basis of the information provided by the developer in accordance with paragraph 4 taking into account, where relevant, the results of preliminary verifications or assessments of the effects on the environment carried out pursuant to Union legislation other than this Directive. The determination shall be made available to the public and:

(a) where it is decided that an environmental impact assessment is required, state the main reasons for requiring such assessment with reference to the relevant criteria listed in Annex III; or

(b) where it is decided that an environmental impact assessment is not required, state the main reasons for not requiring such assessment with reference to the relevant criteria listed in Annex III, and, where proposed by the developer, state any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment."

60 Case C-435/97 World Wildlife Fund v. Autonome Provinz Bozen (Court of Justice of the European Union, 16th September, 1999, ECLI:EU:C:1999:418).

its reference to *"comprehensive assessment",* some re-interpretation inasmuch as even full EIA screening may no longer be required after the 2014 Amendment.

40. **Annex III of the EIA Directive**, on foot of Article 4.3, sets non-quantified criteria, under three headings, to determine whether projects require EIA. The first two headings refer to the project – its "*Characteristics*" and its "*Location*". The third heading is different: it canvasses the "*Type and Characteristics of Potential Impacts"*.[61] Of some note, it does so explicitly by reference to the criteria under the first two headings.

41. By way of transposition specifically of Article 4.3 of the EIA Directive[62] as to pre-screening screening for EIA, **Article 109(2) PDR 2001** provides for Preliminary Examination of the question whether EIA is needed. It provides as follows:

> *"(a) Where an appeal relating to a planning application for subthreshold development is not accompanied by an EIAR, the Board shall carry (out)[63] a preliminary examination of, at the least, the nature, size or location of the development.*
>
> *(b) Where the Board concludes, based on such preliminary examination, that —*
>
> *(i) there is no real likelihood of significant effects on the environment arising from the proposed development, it shall conclude that an EIA is not required,*
>
> *(ii) there is significant and realistic doubt in regard to the likelihood of significant effects on the environment arising from the proposed development, it shall, …. require the applicant to submit ….. the information specified in Schedule 7A[64] for the purposes of a screening determination unless the applicant has already provided such information, or*
>
> *(iii) there is a real likelihood of significant effects on the environment arising from the proposed development, it shall —*
>
> - *conclude that the development would be likely to have such effects, and*
> - *…… require the applicant to submit … an EIAR and to comply with the requirements of article 112[65]."*

42. **Article 109(4)** requires the Board, in making a Screening Determination, to have regard to the criteria set out in **Schedule 7 PDR 2001**, whereas Article 109(2) requires the Board, in Preliminary Examination to examine *"at the least, the nature, size or location of the development."* The contrast

61 On (a) population and human health; (b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC; (c) land, soil, water, air and climate; (d) material assets, cultural heritage and the landscape; (e) interaction between factors (a) to (d). (All factors listed in Art 3.1).
62 S.172 PDA 2000 transposes Article 4 of the EIA Directive generally.
63 Word missing in original.
64 Information to be Provided by the Applicant or Developer for the Purposes of Screening Sub-Threshold Development for Environmental Impact Assessment.
65 Public notice of intention to submit EIAR and of public entitlement to make submissions or observations.

is notable. Schedule 7 transposes Annex III of the EIA Directive[66] as to its non-quantified criteria to determine whether projects require EIA.[67] It does so in terms very similar to those of Annex III.[68] Of some present interest, both Annex III and Schedule 7:

- in describing "*Location*" refer to the environmental sensitivity of geographical areas likely to be affected by the proposed development, with particular regard to, inter alia, the relative abundance, availability, quality and regenerative capacity of natural resources, including biodiversity, in the area.

- in describing "*Types and characteristics of potential impacts*", refer to the likely significant effects on the environment of proposed development with regard to their impact, inter alia on "*biodiversity, with particular attention to species and habitats protected under the Habitats Directive ….*;"[69]

So, "*biodiversity, with particular attention to species and habitats protected under the Habitats Directive ….*" is explicitly a concern of EIA.

2 - Particulars

43. The Particulars of Ground 2 as to EIA allege:[70]

- The Inspector reported to the Board her opinion that, on Preliminary Examination and having regard to the "*nature, size and location of the development*", EIA was unnecessary.

- The Inspector's Preliminary Examination was of the Proposed Development[71] and of Option B.[72]

- The Board did no Preliminary Examination of the Permitted Development as it could not rely on the Inspector's Preliminary Examination of an entirely different development to that permitted.

- In any event, the Board, in the Impugned Permission, did not accept or adopt the Inspector's Report and, in breach of Article 109(2) did not do a Preliminary Examination.

- In addition, the conclusion of no likely significant effect on the environment was wrong in law, irrational and unreasonable and/or incompatible with the EIA Directive given the failure to

66 Substituted by article 69(b) of S.I. No. 296/2018 - European Union (Planning and Development)(Environmental Impact Assessment) Regulations 2018.
67 On (a) population and human health; (b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC; (c) land, soil, water, air and climate; (d) material assets, cultural heritage and the landscape; (e) interaction between factors (a) to (d). (All factors listed in Art 3.1)
68 Any differences are not of present relevance.
69 Annex III by reference to Article 3(1) of the EIA Directive; Schedule 7 by reference to 171A (b)(i)(I) to (V) PDA 2000 (definition of "environmental impact assessment").
70 Amended Statement of Grounds §12 - 14 - I have paraphrased and reformatted the content for exposition but the sense is unchanged. Despite a typographical error in the heading at p6, the content of §§12 – 14 in fact related to Ground 2 as opposed to Ground 3.
71 i.e. including Block B.
72 i.e. including Block B but reducing the number of floors in Blocks A and B.

properly assess the significant potential impacts on bats entitled to strict protection pursuant to the Habitats Directive.[73]

44. So there are three bases of challenge to the Preliminary Examination for EIA, by reference, in summary,

- the Board's alleged failure to either adopt the Inspector's report or itself record that it had done a Preliminary Examination.
- the alleged difference between the Proposed Development considered by the Inspector and the Permitted Development, and
- the Board's alleged failure to properly assess potential impacts on bats.

The first is an issue whether the Board did a Preliminary Examination. The second and third are issues as to its adequacy, if done.

2 - Mistransposition Not Pleaded

45. In written submissions[74] Shadowmill asserts that **Article 4.3** of the EIA Directive allows what Irish Law terms Preliminary Examination only by permitting Member States to set thresholds or criteria to determine when projects need not undergo EIA Screening and does not permit Preliminary Assessment by way of "*case by case examination*". Shadowmill submitted that Article 109 PDR 2001 sets no thresholds or criteria for Preliminary Examination.

46. The Board cited **Rushe**[75] in objecting that this submission by Shadowmill is an unpleaded assertion of mistransposition by Ireland of Article 4.3 and the State has not been joined to the proceedings. It would be a necessary respondent to an allegation of mistransposition.

47. The caselaw as to the importance of pleadings in judicial review was recently considered in a recent **ETI case**[76] in terms I need not repeat here. Suffice it to say that pleadings rules in judicial

73 Amended Grounds §Eb)12
74 §§20 & 21.
75 Rushe v An Bord Pleanála [2020] IEHC 122; [2020] IEHC 429.
76 Environmental Trust Ireland v An Bord Pleanála & Limerick City and County Council [2022] IEHC 540 §211 et seq citing Martin v. An Bord Pleanála [2022] IEHC 256 (High Court (Judicial Review), Ferriter J, 27 April 2022); The Board of Management of St. Audeon's National School v. An Bord Pleanála [2021] IEHC 453 (High Court (Judicial Review), Simons J, 15 July 2021); People Over Wind v. An Bord Pleanála (No. 1) [2015] IEHC 271, the High Court; (Haughton J.); AP v. Director of Public Prosecutions [2011] 1 I.R. 729; Clifford & Sweetman v An Bord Pleanála & Ors [2021] IEHC 459; Rushe & anor -v- An Bord Pleanála [2020] IEHC 122 (High Court (Judicial Review), Barniville J, 5 March 2020); Perrigo Pharma International DAC v. McNamara [2020] IEHC 552 (High Court (Judicial Review), McDonald J, 4 November 2020); Casey v. Minister for Housing [2021] IESC 42 (Supreme Court, Baker J, 16 July 2021); Reid v. An Bord Pleanála [2021] IEHC 230 (High Court (Judicial Review), Humphreys J, 12 April 2021); Foley v. Environmental Protection Agency [2022] IEHC 470 (High Court (General), Twomey J, 26 July 2022).

review are strict and impose an "*absolute necessity for a precise defining of the grounds*". Though the decision of the CJEU is awaited, it is nonetheless notable that in **Eco Advocacy**[77] AG Kokott has recently advised that court that it is in accordance with EU law to confine both the parties and the court's consideration[78] in cases raising EU law issues, to the pleadings as long as that is done on the same basis as they would be so confined on domestic law issues (i.e. subject to the principle of equivalence). Though it did not explicitly articulate the principle of limitation of the scope of judicial review by pleadings, **Hellfire Massy**[79] is notable as a practical example of holding parties to their pleadings. I need not here explore the limits of such flexibility as a "*fair and reasonable reading*"[80] of the pleadings may allow, as arguing an unpleaded inadequate transposition case lies far outside those limits. Given the pleadings, in this case at least, I must proceed on the basis that the Board's duties are, for purposes of Article 4.3 of the EIA Directive, adequately transcribed by Art 109 PDR 2001.

2 - EIA – General Observations

48. However, the exclusion of an unpleaded assertion of inadequate transposition does not obviate the requirement for a conforming purposive interpretation of Article 109 PDR 2001 having regard to the purposes of the EIA Directive - within the limits of the contra legem principle. With that in mind and before considering the pleaded issues, I should set out the underlying law as to whether, as to a given development, EIA must be considered or required.

Development Types and Subthreshold Development

49. By **Article 2** of the **EIA Directive**[81] EIA is required, for development projects of classes defined in **Article 4**, before development consent (in this case planning permission) can be given for such projects, where those projects are likely to have significant effects on the environment. The general and overarching requirement of the EIA Directive is that Member States ensure that all projects within the identified classes, regardless of their size, are subjected to EIA before development consent is given if they are likely to have significant effect on the environment.

50. As Ireland has transposed the EIA Directive, such projects are identified in three groups by **S.172 PDA 2000**[82] and **Schedule 5 PDR 2001**.[83]

77 CASE C-721/21 opinion of Advocate General Kokott delivered on 19 January 2023.
78 This refers to the so-called "own motion obligation", which AG Kokott says has been widely misunderstood.
79 Hellfire Massy Residents Association v. An Bord Pleanála [2022] IESC 38 (Supreme Court, O'Donnell CJ, 24 October 2022).
80 The Board of Management of St. Audeon's National School v. An Bord Pleanála [2021] IEHC 453 (High Court (Judicial Review), Simons J, 15 July 2021).
81 Directive 2011/92/EU Of the European Parliament and Of the Council Of 13 December 2011 on The Assessment of The Effects of Certain Public and Private Projects on The Environment as Amended By: Directive 2014/52/EU Of the European Parliament and Of the Council Of 16 April 2014.
82 Planning and Development Act 2000 as amended.
83 Planning and Development Regulations 2001 as amended.

- First, EIA is automatically required of certain listed classes of project.
- Second, EIA is automatically required of certain other listed classes of project where they exceed a quantitative threshold or limit set for each class.
- Third, and as relevant here, EIA is required for those classes of project in the second class which do not exceed the relevant threshold or limit but which, nonetheless, are likely to have significant effects on the environment. This third group is termed "*sub-threshold development*".[84]

These three groups of requirement combine to ensure EIA of all projects within the specified classes which are likely to have significant effects on the environment are subjected to EIA as required by Article 2 of the EIA Directive.

51. **Schedule 5, Part 2, PDR 2001** identifies the second group by listing classes of development which automatically require EIA if the threshold or limit specified for that class is exceeded. Class 10(b)(i) is construction of more than 500 dwelling units. Class 10(b)(iv) is urban development which would involve an area greater than 2 hectares in the case of a business district, 10 hectares in the case of other parts of a built-up area and 20 hectares elsewhere. Accordingly, it will be seen that, as to sub-threshold developments in those classes, a case-by-case decision is required whether EIA is required in respect of all projects for the construction of dwelling units and for urban development. That is decided by reference, in each case, to the question whether the proposed development is likely to have a significant effect on the environment.

EIA Screening & Preliminary Examination - Introduction

52. Typically, a case-by-case decision as to whether sub-threshold development is required is done by a formal "EIA Screening", for which Article 4 EIA Directive and Article 109(4) PDR 2001 provide. However, it was found in practice that even formal EIA Screening was unnecessary and wasteful in respect of many, typically small, sub-threshold developments of which it was in truth obvious that they were not likely to have significant effects on the environment and did not require EIA. Nonetheless, some form of determination was necessary as to whether such developments required EIA. Hence, in 2014, what may be considered a pre-screening screening process, was provided for in Article 4 EIA Directive. In reliance on that provision, "Preliminary Examination" for EIA was introduced in Ireland in 2018 in the form of Article 109(2) PDR 2001.

53. It is as well to observe however that the EIA Directive, though in substance providing for them, refers to "Screening" only in its recitals and does not refer at all to "Preliminary Examination" - which is a phrase used in Article 109(2) PDR 2001 to describe the Irish transposition of the pre-screening screening procedure for which Article 4(3) of the EIA Directive provides. That observation has no legal consequence but may assist in considering the legislation.

84 Article 92 PDR 2001 provides that "sub-threshold development" means development of a type set out in Part 2 of Schedule 5 which does not equal or exceed, as the case may be, a quantity, area or other limit specified in that Schedule in respect of the relevant class of development.

54. There is, as yet, little authority on Preliminary Examination for EIA. In the context of Strategic Housing Developments it received some consideration in **Jennings**.[85]

Screening & Significance of Effect on the Environment

55. Ultimately, the standard for concluding that EIA is required or not required is necessarily the same in Preliminary Examination as in EIA Screening – i.e. "*that there is no real likelihood of significant effects on the environment arising from the proposed development*". The concept of significance of effect on the environment was recently addressed in **MRRA**.[86] I will not repeat that exercise here, but note that **Tromans**[87] asserts that "*A key principle so far as the courts are concerned is that significance is not a hard-edged concept and the assessment of what is significant requires an exercise of judgement. …….. they will, therefore, not lightly interfere with the decision reached by the planning authority".* Tromans cites, inter alia, **Bateman**[88] in which Moore-Bick LJ states: " ….. *I do not think that one should attempt to place too rigid an interpretation on the word "significant" in this context*, ….". **Thakeham**[89] cites **Jones**[90] in which it was held, as to screening, that:

- The word "significant" does not lay down a precise legal test.
- Whether a project was likely to have significant effect on the environment is a question of degree which calls for the exercise of judgement – a function for which "*the courts are ill-equipped*".
- Significance of effect is "*not a question of hard fact to which there can only be one possible correct answer in any given case*".
- The screening decision determination of "significance" is a matter for the administrative authorities - reviewable as to its merits only for irrationality.[91]
- A planning authority must have sufficient information about the impact of the project to be able to make an informed judgment as to whether it was likely to have a significant effect on the environment.
- But that does not mean that all uncertainties must be resolved or that a decision that an EIA is not required could only be made after a detailed and comprehensive assessment had been made of every aspect of the matter. The planning authority must have regard to any gaps in the information before it and to any uncertainties that may exist, as to the likelihood of significant environmental effects. But such gaps and uncertainties might or might not make it impossible reasonably to conclude that there was no likelihood of significant environmental effect.
- It is "*possible in principle to have sufficient information to enable a decision reasonably to be made as to the likelihood of significant environmental effects even if certain details are not known and further surveys are to be undertaken*"

85 Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14 §614 – 617, 624 et seq, 648 et seq. It was considered in Waltham Abbey v An Bord Pleanála [2021] IEHC 587 & [2022] IESC 30 but not in any detailed manner or any relevant to the present case.
86 Monkstown Road Residents' Association v An Bord Pleanála [2022] IEHC 318 (High Court (General), Holland J, 31 May 2022).
87 EIA, 2nd Edition §3.141.
88 R(Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157 §19.
89 R (Thakeham Village Action Ltd) v Horsham District Council [2014] EWHC 67 (Admin)
90 R (Jones) v Mansfield District Council [2003] EWCA Civ 1408, [2004] 2 P & CR 233; [2003] All ER (D) 277 (Oct).
91 The judgments refer to "conventional "Wednesbury" grounds."

- Everything depends on the circumstances of the individual case.

56. It does bear remembering that, as noted by the CJEU in **Mellor**[92] and in **Wells**,[93] by Advocate General Bobek in **Klohn**[94] and by the Court of Appeal of England & Wales in **Huddleston,**[95] the purpose of the EIA Directive, as stated in Recital 6*[96], is to ensure EIA of *"projects likely to have a major effect on the environment".* Costello J described it as a "*pertinent*" recital in **Callaghan**[97] - though it does not seem to have featured much further in that decision. However, it does seem to me that the word "*major*" sheds appreciable light on the concept of significance of effect. And Lindblom J in **Thakeham** cites Moore-Bick LJ in **Bateman**[98] to the effect that screening is simply "*a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment…..*".

Preliminary Examination compared to EIA Screening

57. Preliminary Examination under Article 109(2) PDR 2001 and EIA Screening under Article 109(4) PDR 2001 do not differ in the subject matter of their inquiry: the question in both processes is ultimately[99] whether significant effect on the environment is likely, such as to require EIA.[100] Indeed the phrase *"at least, the nature, size or location of the development"* in Article 109(2) PDR 2001 is taken directly from **Article 2 EIA Directive** which obliges Member States to ensure EIA of all *"… projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location .."*

58. As an obiter aside, it may be that Article 109(2) PDR 2001 illustrates the dangers of uncritical adoption of phrases from a directive into a transposing regulation. In Article 2 EIA Directive the word "or" in "*nature, size or location .."* operates grammatically to expand the types of significant effects on the environment which may require EIA. In Article 109(2) PDR 2001 the word "or" could be grammatically understood to allow the examiner an option to limit the scope of enquiry to one or two only of "*nature, size or location".* If so, it would not seem likely to be consistent with a purposive interpretation of Article 109(2) given the wide scope and broad purpose of the EIA Directive - **Kraaijeveld**.[101] It seems to me that Article 109(2) PDR 2001 is one of those instances, as in the **Kent County Council**[102] case and **Bederev,**[103] in which "or" has a conjunctive sense such that Preliminary Examination must encompass at least the nature, size and location of the proposed development.

92 Case C-75/08. Mellor v Secretary of State for Communities and Local Government.
93 Case C-201/02 R(Wells) v Secretary of State for Transport, Local Government and the Regions.
94 Case C-167/17, Klohn v An Bord Pleanála & Sligo County Council - [2019] PTSR 1574.
95 R (Huddleston) v Durham County Council [2000] Env. L.R. 488.
96 "*" denotes derivation from the 2011 EIA Directive in its original form.
97 Callaghan v An Bord Pleanála [2015] IEHC 357
98 R (Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157.
99 Even if, in the case of Preliminary Examination, via a subsequent EIA Screening.
100 Article 109(2)(b)(i) PDR 2001.
101 Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland. Case C-72/95.
102 Kent County Council v Secretary of State for the Environment and Another (1977) 33 P. & C.R. 70 – see further below.
103 Bederev v Ireland, et al [2016] 3 IR 1.

59. The difference between Preliminary Examination and EIA Screening lies in the depth of inquiry. The rationale of Preliminary Examination is precisely that a lesser depth of inquiry may suffice to answer the same ultimate question. In **Jennings**[104], the view was expressed that, while a gloss on the Article 109(2) concept of "*no real likelihood*" may not be required, **Bateman**[105] and **Devon Wildlife Trust**[106] assisted as authority that the question in EIA screening is whether there is a "*serious possibility*" of significant effect on the environment. The word serious has no exaggerated meaning - it connotes merely a likelihood worthy of being taken seriously. However, and while glossing statutory words can be perilous, it seems to me logical and useful to describe the "*no real likelihood"* criterion as satisfied where one can describe it as "*unreal*" to suggest that significant effects are likely. Clearly, given the terms of Article 109(2) PDR, the criterion of "*no real likelihood of significant effects on the environment*" is also to be contrasted with that of *"significant and realistic doubt in regard to the likelihood of significant effects",* which is the trigger for requiring EIA Screening. Logically, given the structure of Article 109(2) PDR, as the choice is a binary one to screen or not to screen[107], the presence of "*no real likelihood of significant effects"* is equated with the absence of "*significant and realistic doubt"* in that regard. They are the opposite sides of the same coin. Whether the word "and" represents a binary and cumulative requirement and whether a doubt which was significant but not realistic, or realistic but not significant, would trigger EIA screening may await argument on particular facts - which may in practice prove unlikely to arise. Pending such a case, it seems best to regard the "*significant and realistic doubt"* as representing a single unified standard.

60. The bar to concluding in Preliminary Examination that neither EIA nor even EIA Screening is required is a high one as it is intended only to weed out the projects which obviously do not require EIA. To paraphrase AG Sharpston in **Case C-258/11, Sweetman**[108] as to Habitats Law, the question in Preliminary Examination for EIA is "*Should we bother to even screen for EIA*?" That does convey, in a general way, both why Preliminary Examination was introduced and that it is intended to impose a lesser obligation of examination by the decision-maker than is imposed by EIA Screening and a lesser obligation on the developer as to the information to be provided to enable a decision whether EIA is required.

61. But those obligations are lesser precisely because the conclusion can properly be said to be fairly obvious. To put it another way, that those obligations are lesser and the inquiry less deep and that what is at stake is no more than an obligation to screen for EIA, require that the precautionary principle must be applied with rigour in Preliminary Examination. I do not suggest it has occurred, or would occur, but Preliminary Examination cannot degenerate into a "Get out of EIA Screening Free card".

104 §653.
105 R (Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157.
106 R (Devon Wildlife Trust) v Teignbridge District Council [2015] All ER (D) 359 (Jul) [2015] EWHC 2159 (Admin).
107 Ignoring for present purposes the possibility of going directly to EIA.
108 Sweetman v An Bord Pleanála (Case C-258/11).

62. I accept Shadowmill's submission, citing the Polish case **C-526/16**,[109] that the precautionary principle requires that the likelihood of significant effect to the environment must be considered to exist when that likelihood cannot be objectively excluded. Since the hearing of this case this principle has been repeated by AG Kokott, in **Case C-721/21 Eco-Advocacy**[110] and **Waltham Abbey #3.**[111] But as the principle was laid down earlier and cited in the hearing of this case it is not necessary to refer back to the parties for comment. The **Basildon Golf Course** case,[112] cited in **MRRA,** is not merely authority that, while EIA screening need not be elaborate, it must demonstrate that the issues have been understood and considered. It is also authority that the conclusion that EIA is not required must be based on information that is both accurate and sufficient. In my view, while care must be taken not to impose the burden of full EIA screening which Preliminary Examination is intended to avoid, nonetheless it necessarily follows, as much in Preliminary Examination as in EIA Screening, that any conclusion that EIA is not required must be objectively supportable.

63. It must be acknowledged that, as I have said, Article 109(4) requires the Board, in EIA Screening, to have regard to the criteria set out in Schedule 7, whereas Article 109(2) requires the Board, in Preliminary Examination to examine *"at the least, the nature, size or location of the development."* Articles 109(2) and 109(4) explicitly differ in this respect. However, as,

- the ultimate question is the same – as to significant impact on the environment,
- that phrase in Article 109(2) is drawn directly from Article 2 of the EIA Directive,
- the words "at least" in Article 109(2) clearly correlate to the words "inter alia" in Article 2 of the EIA Directive and oblige the Board to conduct such examination, if needs be beyond *nature, size or location,* as will suffice, by reference to that ultimate question, to draw the conclusion rendered necessary by the general obligation imposed by Article 2 of the EIA Directive to ensure that all projects likely to have significant effect on the environment are subjected to EIA,

a purposive interpretation of Article 109(2) in light of the purposes of the EIA Directive seems to be required. As the ultimate question is the same and as the concept of significance of effect must be the same as in EIA Screening, the law on EIA Screening illuminates that of Preliminary Examination. In my view, as **Garcia-Ureta** asserts,[113] Annex III of the EIA Directive,[114] as transposed to Irish Law,[115] which sets criteria to determine whether a Project requires EIA, must apply in Preliminary Examination as in EIA Screening, at least as to identifying the subject matters of inquiry – even though the depth of inquiry is attenuated in Preliminary Examination as compared to EIA Screening.

109 Commission v Poland, Case C-526/16 §67. This judgment is not available in English but is cited to this effect in Case C-721/21 Eco Advocacy CLG Opinion of Advocate General Kokott delivered on 19 January 2023 and in case C-575/21Wertinvest Hotelbetrieb Opinion of Advocate General Collins delivered on 24 November 2022.
110 Case C-721/21 Eco-Advocacy CLG v. An Bord Pleanála Opinion of the Advocate General, 19th January, 2023, ECLI:EU:C:2023:39.
111 Waltham Abbey Residents Assoc v An Bord Pleanála & Ors, [2023] IEHC 146.
112 R (Friends of Basildon Golf Course) v Basildon District Council [2010] EWCA Civ 1432 §62.
113 Garcia-Ureta asserts that if Member States decide to apply the second sentence of Article 4(3) ('[they] may set thresholds or criteria to determine when projects need not undergo either the determination under paragraphs 4 and 5 or an EIA, and/or thresholds or criteria to determine when projects shall in any case be made subject to an environmental impact assessment without undergoing a determination set out under paragraphs 4 and 5'), then they inevitably have to apply the new drafting of Annex III. - Environmental Liability, Law Practice and Policy/2014 - Volume 22/Issue 6, 1 December/Articles/Directive 2014/52 on the Assessment of Environmental Effects of Projects: New Words or More Stringent Obligations? – (2014) 22(6) Env Liability: 239; AgustÌn GarcÌa-Ureta Professor of Law, University of the Basque Country, Bilbao Visiting Scholar, Cambridge University. Article cited in Waltham Abbey Residents Association v An Bord Pleanála [2021] IEHC 312 (High Court (Judicial Review), Humphreys J, 10 May 2021). (Annex III sets the criteria for screening decisions).
114 "Criteria to Determine Whether the Projects Listed in Annex II Should be Subject to an Environmental Impact Assessment"
115 Schedule 7, PDR 2001.

64. It also seems to me that, as a matter of internal interpretation of the PDR as a whole, the relationship between Preliminary Examination (which may determine if EIA Screening is required) and EIA Screening requires coherence between Preliminary Examination and EIA Screening. How could one determine in Preliminary Examination if EIA Screening is required, by reference to a single ultimate question whether EIA is required, while ignoring the nature and content of the very procedure – EIA Screening – the potential need for which is being examined?

65. As Article 109(2) expressly invokes the criterion of "*Location*" there is little difficulty (even on an internal interpretation of the PDR as a coherent whole and without recourse to purposive interpretation in light of the EIA Directive) in applying to Preliminary Examination, Schedule 7 PDR as to *"Location"*. So that requires consideration of "*The environmental sensitivity of geographical areas likely to be affected by the proposed development, with particular regard to - (b) the relative abundance, availability, quality and regenerative capacity of natural resources (including … biodiversity)"*

66. Further, the whole focus of Article 2 of the EIA Directive in requiring EIA, and of EIA and of Preliminary Examination for EIA and of Screening for EIA, is the likelihood of significant impact on the environment. That concept of significant impact on the environment must have a common meaning and substantive content in all relevant procedures. So

- in considering "Location" (necessarily including biodiversity and in particular species protected under the Habitats Directive[116]) in Preliminary Examination as Article 109(2) requires,
- as the question posed by Article 109(2) is explicitly of the "*likelihood of significant effects on the environment*", and
- as both Annex III of the EIA Directive and Schedule 7 PDR 2001 explicitly correlate the criterion of "*Location*" with the issue of "*Types and Characteristics of Potential Impacts*", which issue in turn is explicitly described in terms of "*likely significant effects on the environment*", and
- having regard to the schemes respectively of the EIA Directive and the PDR 2001 as to EIA,

it seems to me ineluctable that Garcia-Ureta is correct in asserting that Annex III of the EIA Directive, (as transposed to Irish Law by Schedule 7 PDR 2001), must apply in Preliminary Examination as in EIA Screening.

67. Any other conclusion would result in dissonance between Preliminary Examination and EIA Screening in their common function of determining whether EIA of a project is required. So, it seems to me that Annex III and Schedule 7 PDR 2001 necessarily identify the common subject-matter of inquiry – as opposed to depth of inquiry – in Preliminary Examination and EIA Screening.

116 See above.

68. In turn that requires, as Annex III of the EIA Directive and Schedule 7 PDR 2001 as to Types and Characteristics of Potential Impacts cross-refer respectively to Article 3.1 of the EIA Directive and S.171A(b)(i)(I) to (V) PDA 2000, that Preliminary Examination must consider "*biodiversity, with particular attention to species and habitats protected under the Habitats Directive*" – including particular attention to bats. However, it seems to me acceptable in principle that such "particular" attention to bats might be found in an expert report dedicated to the topic of bats, such that an inspector and the Board might satisfy the criterion by accepting the content of such a report.

69. It is notable also that **Recital 22****[117] **EIA Directive** requires that, to ensure a high level of protection of the environment EIA screening and EIA take account of the impact of the whole project during the construction, operational and demolition phases. **Recital 35**** requires that mitigation address significant adverse effects on the environment resulting from the construction and operation of a project. As it is "projects" that are subjected to EIA, it is notable that **Article 1 EIA Directive** defines a project as meaning inter alia "*the execution of construction works*" and by **Annex IV** an EIAR[118] must include a description of the likely significant effects of the construction of the project on the environment.

2 - EIA – Was a Preliminary Examination done?

70. As recorded above, on 25 July 2020 an official of the Board completed the EIAR Pre-Screening Form. It is a non-statutory form which, I infer, was adopted by the Board for internal administration purposes. It has no formal legal status. The first entry was as follows:

1 - Does the proposed development constitute an EIA project? (~~that is involving construction works, demolition, or interventions in the natural surroundings~~)[119]	Yes	
	No	✓

71. It is difficult to know what to make of this entry: not least the striking out, by hand, of the words in brackets, and, in context, the words "*constitute an EIA project*" given the answer is clearly not intended to express a conclusion whether EIA is required. I infer that the phrase means a project of a type or class possibly requiring EIA. On that basis,

- the answer "No" implies that the question of EIA Preliminary Examination need be taken no further.
- the answer is wrong if it is understood as stating that the Proposed Development does not fall within a class of development specified in the EIA Directive and transposing legislation as potentially requiring EIA: it is clearly both construction of dwelling units and urban development within Schedule 5 Part 2 §10(b)(i)&(iv) PDR 2001.

117 In the Consolidated Directive "**" denotes derivation from the 2014 Amending Directive.
118 Environmental Impact Assessment Report – to be supplied by the developer if EIA is required.
119 Strike-through by hand in original.

72. However despite the answer "no" to question 1, the official did take matters further - as follows:

2. If YES, does the proposed development, or any part of it, fall within a class of development set out in Part 1 or Part 2 Schedule 5 of the Planning and Development Regulations?				
Tick		Threshold	Comment (if Relevant)	Conclusion
No	✓	N/A		No EIAR or Preliminary Examination Required
Yes				

73. It is difficult to know why this section was completed, given the answer to the previous section was "No" and this section required completion only if the answer had been "Yes". In any event, the tick for "No" and the entry "N/A" under "threshold" clearly follow from the previous erroneous answer: the question of application of a threshold did not apply as the development, it was erroneously said, was not a project of a type or class possibly requiring EIA. The conclusion "*No EIAR or Preliminary Examination Required*" is clearly wrong – at least as to Preliminary Examination. The Proposed Development is both construction of dwelling units and urban development and so potentially requires EIA even if below the thresholds for automatic EIA set in Part 2 of Schedule 5 PDR 2000 §10(b)(i)&(iv).

74. So, at very least, Preliminary Examination was required. The whole point of Preliminary Examination, and indeed of EIA Screening, is to discern whether sub-threshold EIA is needed. If the thresholds are exceeded, EIA is automatic, and issues of Preliminary Examination and Screening do not arise.

75. Given the argument by Shadowmill, to which I will come, it is not gratuitous – it is necessary – to observe that this EIAR Pre-Screening Form, as completed, makes no sense whatsoever. Internally even, it makes no sense.

76. Fortunately, the Inspector realised that the EIAR Pre-Screening Form was in error as, despite its conclusion that Preliminary Examination was not required, she in fact did, and reported to the Board, a Preliminary Examination. It was not disputed and accept that there is a direct and clear contradiction between the conclusion stated in the EIAR Pre-Screening Form and the fact that the Inspector did a Preliminary Examination.

77. As stated, the Inspector swore an affidavit[120] confirming that, while another Board official completed the "*EIA pre-screening form*" which stated that no EIAR or Preliminary Examination was

120 Dated 22 July 2022.

needed, she did perform a Preliminary Examination and thereby herself concluded that EIA was not needed. In my view that is in any even apparent from her report and so her affidavit is not a retrospective attempt edit that report or supply reasons for the Impugned Decision.

78. The Board did not explicitly address – whether by Preliminary Examination or EIA screening or by agreement or disagreement with the Inspector's report - whether EIA was required. That is entirely and emphatically to be regretted. The Board's duty of, at least, Preliminary Examination was theirs, not the Inspector's. The members of the Board were handed a Preliminary Examination by the Inspector, as it were, on a plate. Had they taken the simple, obvious, undemanding and eminently desirable course of expressing their agreement with it, at very least appreciable Court time (and perhaps costs) might have been saved.

79. The regrettable aspect of this situation is amplified by the fact that the EIAR Pre-Screening Form is clearly and significantly wrong in its conclusion that no Preliminary Examination was required. This unfortunate combination of circumstances enabled Shadowmill to argue, stateably, that it must be inferred that the Board simply looked at the EIAR Pre-Screening Form, saw that it said "*No EIAR or Preliminary Examination Required*" and so overlooked the fact that the Inspector had done a Preliminary Examination and did none itself.

80. Were I to draw such an inference the Board would only have itself to blame. However, not without hesitation, and arguable though Shadowmill's position is, I have concluded, in part on the basis of the authorities cited below as to the relationship between a Board decision and an inspector's report, that I would be in error to interpret the Board's regrettable silence on this issue as favouring the error in the Form rather than the correct decision of the Inspector to perform a Preliminary Examination. The presumption of validity of impugned decisions and its corollary that Shadowmill bears the burden of proof of invalidity of the Impugned Decision also seem to me to support interpreting these circumstances in the Board's favour.

81. Shadowmill cite **Balz#1**[121] in arguing that the presumption of validity cannot avail the Board here. In that case Barton J considered, as to EIA and AA and in light of judgments of the CJEU, *"that deficiencies in the record which result in the court being unable to determine whether or not these obligations have been complied with are fatal to the lawfulness of the decision and cannot be displaced or cured by a presumption that the Board acted lawfully. Such a presumption does not arise or exist in vacuo but is founded upon an appropriate and adequate record of what it was that the Board was required to do in relation to those matters which are called into question."*[122] However the preceding paragraph made clear that Barton J's concern was as to adequacy of reasons – a plea not made in the present case. He said *"The adequacy or sufficiency of the statement of reasons .. must be apparent and are to be ascertained from the record. What constitutes the record and whether or not the record in this case is sufficient for the purposes of meeting the requirements necessary to show*

121 Balz v An Bord Pleanála [2016] IEHC 134 (High Court, Barton J, 25 February 2016)
122 §59.

that the Board complied with its statutory obligations concerning the EIA and AA is in issue."[123] He held on the facts of that case that "*in determining whether an EIA has been carried out and completed, the report of the Inspector may be read with the decision of the Board*".[124]

82. If, as the cases below demonstrate, the inspector's errors may be imputed to the Board in the absence of their express rejection, a fortiori, it seems to me, if the Inspector gets it right and the Board does not distance itself from the Inspector in this regard, the inspector's having got it right will be attributed to the Board in the absence of positive evidence to the contrary. And where (as here) the Board expressly identifies respects in which it disagreed with the Inspector, the inference must be the easier to draw that in all other respects it agreed with the Inspector.

83. It is clear that *"The inspector recommends but the Board decides."*[125] But the role of the Inspector's Report in the Board's decision-making process and as a source of interpretation of the Board's decision is statutory[126], central, clear and long-established.[127] The Inspector is obliged by statute to make a recommendation to the Board as to what its decision should be, and the Board must consider that recommendation. While the Board members must have proper regard to the entire file of documents properly before them, the Inspector's Report is no doubt of great assistance to them in drawing together, organising and analysing the facts and issues thrown up by those documents, in a manner with which the Board may not, but more often does, agree.

84. As a general proposition, the inference that the Board has adopted the Inspector's reasoning is easily drawn. Recently, in **PKB**,[128] Ferriter J cited **Connelly**[129] for the well-established principle that "*in the absence of any express disagreement, the reasoning in the Inspector's Report may be imputed to the Board decision*". In a recent **Dublin City Council** case[130] Humphreys J cited a "*myriad*" of cases - a "*landslide of jurisprudence*" - in which the Board has been held to have impliedly accepted the inspector's report, whether or not that specific language is used. **Redrock** is to similar effect.[131] In **Maxol**[132] Clarke J inferred that the Board's reasoning was the same as the Inspector's because he found no evidence to the contrary. Indeed, this approach is strong enough even to undermine impugned decisions despite the presumption of validity. In a **Cork City Council** case[133] because the Board did not differ from the recommendations made by her, nor was there an obvious dissent from her line of thought, Kelly J inferred that the Board had adopted its Inspector's error in interpreting a development plan contribution scheme. In **Ógalas**[134] Baker J cited **Maxol** as requiring some identifiable evidence if an inference is to be drawn that the Board did not wholly adopt the reasoning

123 §58.
124 §161.
125 Craig v An Bord Pleanála [2013] IEHC 402; Ógalas Limited (t/a Homestore and More) v An Bord Pleanála [2015] IEHC 205 §18.
126 E.g. S.146 PDA.
127 E.g. Ógalas Limited (t/a Homestore and More) v An Bord Pleanála [2015] IEHC 205; Connelly v An Bord Pleanála [2018] IESC 31; [2018] 2 ILRM 453.
128 PKP Partnership v An Bord Pleanála & Others [2022] IEHC 542.
129 Connelly v An Bord Pleanála [2018] IESC 31; [2018] 2 ILRM 453.
130 Dublin City Council v An Bord Pleanála [2022] IEHC 5.
131 Redrock Developments v An Bord Pleanála [2019] IEHC 792 (Faherty J §134).
132 Maxol Limited v An Bord Pleanála [2011] IEHC 537.
133 Cork City Council v An Bord Pleanála [2007] 1 I.R. 761.
134 Ógalas Limited (t/a Homestore and More) v An Bord Pleanála [2015] IEHC 205.

of its inspector. She held that if the Board does not distance itself from an error in its inspector's report, the Board's decision may be vitiated. By this, Baker J can only have meant that the inspector's error may be attributed to the Board in such circumstances. However, on the facts, the documentary record in Ógalas demonstrated that in that case the Board had not adopted the inspector's error.[135] And in **Sliabh Luachra**[136] McDonald J cited authority[137] to the effect that *"Those decisions demonstrate very clearly that it is not necessary that the respondent should expressly adopt the report of an inspector where it is reasonable to conclude that the respondent adopted the reasoning of the inspector in arriving at its decision."* The *"landslide of jurisprudence"* was cited in **MRRA**,[138] to a conclusion that *"Clearly, the courts will not strain to find that the Board rejected its Inspector's report."*

85. Shadowmill cites Redrock as an authority requiring active acceptance by the Board of its inspector's report – as opposed to mere non-disagreement. I respectfully reject that argument. Redrock is unsurprising authority allowing the inference of agreement from particular positive circumstances.[139] It is not an authority requiring such positive circumstances in order to draw such an inference. **PKB**, **Maxol** and **Ógalas** suggest that mere non-disagreement by the Board with its inspector will suffice to permit the inference of agreement absent evidence to the contrary (which evidence there was in Ógalas).

86. In my view and at least generally, the fact that the Board has expressly disagreed with the inspector on one issue does not undermine the inference of its agreement with the inspector on other issues: indeed it may strengthen the inference as illustrating the Board's awareness that where it did disagree on an issue it should expressly say so.

87. I do not see that Shadowmill's citation of **Deerland**[140] avails it in this particular respect. The case before me is not a case of the Board's reliance on affidavits or other evidence from outside the statutory process, much less ex post facto evidence to supply reasons for its decision. While Kelly J in Deerland doubted earlier cases[141] as to the inference, from its silence, of the Board's agreement with its inspector, he did not overrule those cases and departed from them pursuant to a different statutory code – as to aquaculture licences. I was not addressed as to the degree of any analogy

135 Ógalas Limited (t/a Homestore and More) v An Bord Pleanála [2014] IEHC 487 §47 & 48.
136 Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála [2019] IEHC 888 (High Court (Judicial Review), McDonald J, 20 December 2019).
137 Principally Buckley v. An Bord Pleanála [2015] IEHC 572 which had in turn cited Ní Eili v. EPA (Supreme Court, unreported, 30th July, 1999, Murphy J.), Maxol v. An Bord Pleanála [2011] IEHC 537, Fairyhouse Club Ltd v. An Bord Pleanála (High Court, unreported, Finnegan J. 18th July, 2001), Cork City Council v. An Bord Pleanála [2007] 1 I.R. 761 and Ogalas v. An Bord Pleanála [2015] IEHC 205.
138 Monkstown Road Residents' Association v An Bord Pleanála [2022] IEHC 318 (High Court (General), Holland J, 31 May 2022).
139 Shadowmill asserts that the authorities cited in Redrock relied on of one or more of:

- a comprehensive EIA or Environmental Report upon which an assessment was conducted,
- an assessment by the Inspector that was expressly adopted by the Board
- some other basis on which to infer agreement between the Board and its Inspector, such as the Board agreeing with the Inspector's recommendation.

140 Deerland Construction Limited v The Aquaculture Licences Appeals Board & Ors [2009] 1 IR 673.
141 Mulholland v An Bord Pleanála (No 2) [2005] IEHC 306, [2006] 1 IR 453 and Fairyhouse Club Limited v An Bord Pleanála [2001] IEHC 106 (Unreported, High Court, Finnegan J, 18th July, 2001). In the former, the latter was cited as a case in which the Board did not depart from its inspector's recommendation and in which Finnegan P considered that "In such circumstances, it was not unreasonable to assume that, although the respondent did not expressly say so, it had adopted the inspector's report as the basis of its decision."

between the technical advisor to the Aquaculture Appeals Board in Deerland and an inspector to the Board. And that line of authority which Kelly J doubted was later affirmed in **Buckley**[142] and **Sliabh Luachra.** That apart, the weight of authority, including the more recent authority cited above, is against the application of Deerland by analogy to planning cases. Nor does **Temple Carrig**[143] avail Shadowmill – it is a case (an obvious one at that) as to what will suffice to allow an inference of agreement by the Board with its inspector: it is not a case as to what will not so suffice. Nor do the European cases Shadowmill cites[144] assist it on this particular issue: they relate to the adequacy of reasons not to the identification of reasons.

88. All that said, and remembering that the project of judicial review is the maintenance of the highest standards of public administration,[145] as has been wearyingly repeated in **Fairyhouse**[146] (over two decades ago), **Connelly, Ardragh**,[147] **Owens**,[148] **Redmond**,[149] **Ballyboden**[150] and **MRRA**,[151] (and perhaps other cases) it would be "preferable" in all cases if the Board made expressly clear whether and to what extent it agrees or disagrees with its inspector. Those observations were not intended to dissipate in the ether. They were intended as messages to the Board and to inform its practice. Its failure to provide such basic assistance to the parties and the Court as to a question which routinely arises in every file it considers is distinctly to be regretted. It is not impossible that, despite the landslide of caselaw cite above, a pattern of Board decisions could emerge which could require revisiting by the courts of the very arguably indulgent inferences which have been drawn in such circumstances when considered against the backdrop of the hopes repeatedly, if disconsolately, expressed in those cases and again here. It is, in all but rare cases, a simple matter for the Board to make its position clear.

89. Indeed, it seems likely, given that no less than a landslide of jurisprudence has ensued on this point, that (though I accept the point by counsel for the Board that the issue is rarely the only issue in a case) buried under that landslide are appreciable resources – court time and parties' costs (including the Board's costs) – which need not have been expended on arguing the issue and prospecting for inferences had the advice given many years ago, and repeatedly since, been built into the Board's standard practices.

90. While the landslide of caselaw binds me and I follow it, a simple thought experiment illustrates how the operation of how, in this context, the presumption of validity and the burden of proof may work an injustice. Assume an inspector's report records, as here, a preliminary

142 Buckley v An Bord Pleanála [2015] IEHC 572.
143 Board of Management of Temple Carrig Secondary School v An Bord Pleanála [2017] IEHC 452 (High Court, Barrett J, 11 July 2017).
144 Case C-75/08 Mellor §66, Case C-87/02 Commission v Italy §49.
145 R v Lancashire CC ex p. Huddleston [1986] 2 AER 941; Saleem v Minister for Justice, Equality and Law Reform [2011] IEHC 55; Murtagh v. Kilrane [2017] IEHC 384; Environmental Trust Ireland v An Bord Pleanála, Limerick City and County Council & Cloncaragh Investments Ltd [2022] IEHC 540; Jennings v. An Bord Pleanála [2022] IEHC 16.
146 Fairyhouse Club Limited v An Bord Pleanála [2001] IEHC 106 (Unreported, High Court, Finnegan J, 18th July, 2001).
147 Ardagh Wind Farm Ltd v. An Bord Pleanála [2019] IEHC 795 (High Court, Simons J, 22 November 2019).
148 Owens v. An Bord Pleanála [2021] IEHC 532 (High Court (Judicial Review), Barrett J, 27 July 2021).
149 Redmond v. An Bord Pleanála [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020).
150 Ballyboden ITG v An Bord Pleanála [2022] IEHC 7 §15.
151 Monkstown Road Residents' Association v An Bord Pleanála [2022] IEHC 318 (High Court (General), Holland J, 31 May 2022), §§69 & 80 citing Connelly v An Bord Pleanála [2018] IESC 31; [2018] 2 ILRM 453 & Dublin City Council v An Bord Pleanála [2022] IEHC 5.

examination in EIA. Assume, as here, that the Board's decision says nothing on the issue of preliminary examination in EIA. Assume next that the members of the Board in fact overlooked the issue entirely. How possibly could an applicant, in judicial review of the Board's decision, prove that the Board had overlooked the issue and that the Board did not perform a Preliminary Examination in EIA - displacing the inference that it had done so? It is easy to envisage that such an applicant's prospects of proof could be very low despite the fact that, on the assumption of the thought experiment, the Board had in fact failed to perform a Preliminary Examination.

91. Of course, properly, if in fact the Board overlooked the issue it should candidly say so. But while, no doubt, that will be admitted by the Board if it occurred, applicants for judicial review may not regard reliance on such admission to be an entirely satisfactory solution to their genuine problem. It may be, for example, that by the time the matter is raised in judicial review, the Board members in question will no longer reliably remember whether they did an unrecorded preliminary examination in EIA and will be as dependent on the documentary record as is the Applicant and the Court.

92. I should make clear however, that my purpose in these observations is not to purport to change the law. It is to repeat, illustrate and amplify the importance of the judicial pleas in **Connelly, Ardragh**, **Owens**, **Redmond**, **Ballyboden, MRRA**, and again now, that the Board make expressly clear whether and to what extent it agrees or disagrees with its inspector. That said, it does not seem to me radical to change the word "preferable" to "expected" - without necessarily saying "compulsory".

Was Preliminary Examination done? - Conclusion

93. As to the particulars of this case, it is inherently unlikely, as a matter of probability, that in making its decision on any matter the Board would:

- fail to read the Inspector's Report in full.
- prefer to the reasoning of the Inspector's Report a brief, unreasoned, conclusionary, non-statutory, administrative checklist such as an EIAR Pre-Screening Form, completed by an administrative official of the Board.
- in doing so,
    - omit to give, as it is obliged by statute to do, its reasons for disagreeing with the inspector and preferring that EIAR Pre-Screening Form.
    - on the particular facts of this case, prefer an EIAR Pre-Screening Form which, for reasons I have stated, makes no sense whatsoever.
    - prefer the error in the EIAR Pre-Screening Form to the correct decision by the Inspector to do a Preliminary Examination.

94. Given that the foregoing scenario is inherently unlikely and given also the presumption of validity of Impugned Decisions, and the law cited above as to the relationship between the

inspector's report and the Board's decision, I should presume that that scenario has not happened unless there is positive evidence to the contrary. Here, there is none. It is true that the Board departed from the inspector's recommendation that permission be refused but that seems to me a distinct issue from the inspector's view as to Preliminary Examination. So I must, not without appreciable sympathy for the Applicants as to a doubt entirely of the Board's making, reject the submission that the EIAR Pre-Screening Form introduces any uncertainty as to what the Board did, relied on or adopted.

95. I therefore infer as a fact and hold that the Board adopted the Inspector's Preliminary Examination for EIA and so did do a Preliminary Examination for EIA. Whether it was an adequate Preliminary Examination is another question.

2 - EIA – Adequacy of Preliminary Examination – 2 Issues – Nature of Development & Bats

96. As to the adequacy of the Preliminary Examination for EIA, two substantive issues arise, as indicated above:

- Did the Preliminary Examination for EIA suffice as to the Permitted Development – specifically as the Inspector did not, Shadowmill says, do a preliminary examination encompassing a development from which Block B was to be omitted?

- Did the Preliminary Examination for EIA suffice as to bats?

2 - EIA – Nature of Development - Adequacy of Preliminary Examination

97. Shadowmill's submissions on this issue are brief. It says that Article 109 PDR 2001 requires the inspector to assess the nature, size and location of, not the development proposed but the development permitted. In that light and given the omission of Block B, Shadowmill says,

- the Inspector's Preliminary Examination was not of the Permitted Development.
- in adopting the Inspector's Preliminary Examination, the Board's Preliminary Examination was not of the Permitted Development.
- the Board, in order to perform an adequate Preliminary Examination – that is to say, a Preliminary Examination of the Permitted Development - was in substance obliged, but failed, to request further Information as to environmental impacts of the development as altered to omit Block B *"in terms of residential amenity, light, shade, permeability etc."*

98. Shadowmill cites **Clifford**[152] by analogy. The Board also cites **Clifford**[153] by analogy and submits that Shadowmill has made no suggestion of, and had adduced no evidence of, any realistic basis for contending that the omission of Block B and the permission of the scheme thereby reduced would undermine the Inspector's conclusion that the need for EIA could be excluded at preliminary examination and has identified no additional potential environmental impacts.

2 - EIA – Nature of Development - Adequacy of Preliminary Examination – Decision

99. The ultimate point of both Preliminary Examination and EIA Screening is to discern if sub-threshold development requires EIA. The issue is not, per se, the size of the project but is the likelihood of significant effect on the environment - as to which many factors are potentially influential. Shadowmill correctly cite **Case C-392/96**[154] to the effect that small projects can have significant effects. Nonetheless, and assuming the thresholds are set with a view to generally ensuring that developments requiring EIA are subjected to it, and noting that Annex III of the EIA Directive and Schedule 7 PDR 2001 identify the size of the project as one of its characteristics requiring "*particular regard*", it is at a very general level unsurprising to find that a Proposed Development of 32 dwelling units will be considered not to require EIA where the relevant threshold is 500 units. It is all the less surprising to find that a Permitted Development of 18[155] dwellings will be considered not to require EIA. That said, the decision must be made by the Board and made in accordance with law. Its substantive merits or demerits are not for the court to review save for irrationality.

100. From a purposive point of view, I find it easy to accept the general proposition that any Preliminary Examination must be satisfactory as to the Permitted Development - as opposed to the Proposed Development. And the proposition is not controversial that, on certain facts, a change wrought by the Board to a proposed development preliminarily examined by the inspector might require that the preliminary examination be revisited. However that is not to say that the preliminary examination will always, or even generally, require revisitation in such circumstances. I think the answer in a given case may be quite fact-specific. But I do not find it necessary to lay down any general rule in that regard. That, if required, can await another case.

101. In **Clifford**,[156] the Board did an EIA of the proposed greenway and as a result *"omitted two relatively modest sections of the greenway having regard to environmental concerns."* Enterprisingly,

152 See infra.
153 See infra.
154 In Commission v Ireland (Case C-392/96) the Court of Justice held:
"66. Even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of the Directive, such as fauna and/fora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration.
67. Similarly, a project is likely to have significant effects where, by reason of its nature, there is a risk that it will cause a substantial or irreversible change in those environmental factors, irrespective of its size."
155 The number of dwellings for which permission was granted.
156 Clifford v An Bord Pleanála [2021] IEHC 459 at §69 et seq. In that case, the Applicants impugned CPOs and Orders pursuant to the Roads Act 1993 as to a proposed repurposing of the abandoned railway line between Killorglin and Valentia Harbour in County Kerry as a greenway for use by cyclists and pedestrians.

if optimistically, the Applicants impugned the resultant decision on the grounds that, by reason of those omissions, the consented project was different to the project in respect of which consent was sought such that the consented project had not been subjected to EIA. Humphreys J held that:

> *"While there could be cases where a project is so reconfigured by the ultimate permission that the final outcome cannot be said to have been assessed, so the point is somewhat fact-specific, but I think that the facts here do not support the conclusion advanced."*
>
> *"While it is true that the ultimate project approved does have to be assessed, and not just the project for which consent was sought, it is clear from the EIA and habitats directives that a project can be amended following the EIA report or NIS, so an amendment in the final decision does not automatically necessitate revised statements or going back to square one."*

102. The facts in Clifford were, as the parties' resort in this case to reasoning by analogy impliedly acknowledges, different in that the omission of part of the route was "*pending further investigations and the consideration of an increased buffer zone between sections of the Greenway infrastructure and its boundary with the Valentia Estuary shoreline*". The allegation was of "*project splitting or salami slicing*". It was held was not to have been a case of an application reconfigured to produce an outcome that could not have been contemplated or where the outcome ignored the possible future completion of the greenway. And *"By definition, in a context where the application is for the complete greenway, and a section has been omitted, the board has considered the proposal with due regard to its possible final extent."*

103. Albeit in the context of a different statutory scheme,[157] it is of some assistance to note Lilacstone's citation of **O'Connell**[158] as a case in which the "*mere*"[159] omission of a 1km section and a roundabout of a proposed road did not invalidate its EIA or public participation in the approval process and did not render it a "*different scheme*" from that proposed. I accept Lilacstone's submission that, as to EIA, the critical question is whether the Board, in carrying out its EIA screening, considered all potential likely significant environmental impacts associated with the Permitted Development. There is no reason to believe that, for EIA purposes, the omission of Block B effected anything other than a subtraction from any potential likely significant environmental impacts associated with the Proposed Development.

104. Here, the allegation is of permanent omission from the development consent – planning permission – of part of the project of which Preliminary Examination was done. It seems to me this this is a case in which the Permitted Development can truly be described as lesser than the greater Proposed Development. It is a case of a permitted development differing from a proposed development specifically by omission of part of the proposed development. The question here seems to me to be whether there is any reason to conceive that the conclusion in Preliminary Examination

157 Roads Act 1993.
158 O'Connell v Minister of The Environment and Local Government, High Court Finnegan J, 29 March 2001; [2001] Lexis Citation 4285.
159 Per Finnegan P.

of the greater Proposed Development, that there is no real likelihood of significant effects on the environment arising from the Proposed Development, is invalidated by the fact that a lesser Development was permitted. That will not ordinarily be the case - though I do not rule out the contrary possibility arising on specific facts. I agree with Humphreys J in Clifford that the issue is "*somewhat fact-specific*". Like him *"I think that the facts here do not support the conclusion advanced."* Nor have any facts, or even arguments as to the facts, been advanced to suggest that the likelihood of significant effects (whether negative or positive) on the environment is greater or different, in any way or degree of consequence, by reason of the Permitted Development than by reason of the Proposed Development.

105. I do not purport to adopt an exaggerated interpretation of the concept of significance of effect. But it is also the case that, ceteris paribus, small projects are less likely than large projects to have a significant effect on the environment. This is a case of a permission to build 18 apartments as compared to the threshold of 500. As to an allegation that a Preliminary Examination of a larger project of 32 apartments is inapplicable to the 18 permitted, "*Particular regard*" to the size of the Permitted Development in this case is at least significantly suggestive of absence of "*major effect on the environment"* as contemplated in Recital 6* of the EIA Directive.

106. Shadowmill's argument as to the omission of Block B is formal only. It lacks substance and I respectfully reject it. I accept the Board's submission that, on the facts of this case at least, the Preliminary Examination of the greater Proposed Development, suffices as Preliminary Examination of the lesser Permitted Development.

107. In that light I do not consider it necessary to further consider the question whether the Board ought, for EIA Preliminary Assessment purposes, to have bespoken further information or submissions before deciding on the omission of Block B. To any extent that a decision on that issue could be considered necessary, I accept the Board's submissions that there is no basis for a view that, by not bespeaking further information or submissions, it exceeded the limits of its discretion in that regard as to the sufficiency of the information before it to allow it to grant permission or deprived participants in the planning process of fair procedures.

2 - EIA – Bats - Adequacy of Preliminary Examination

2 - EIA & Protected Species – including Namur-Est and Holohan

108. Bats are strictly protected species by virtue of **Article 12 Habitats Directive** which, as to strictly protected species, prohibits:

a. *"deliberate capture or killing of specimens of these species*

b. deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

c. deliberate destruction or taking of eggs from the wild;

d. deterioration or destruction of breeding sites or resting places."

109. **Article 16 Habitats Directive** enables Member States to permit, in limited circumstances and by way of derogation licences, acts which would otherwise be in breach of Article 12. Ireland has transposed Articles 12 and 16 by **Articles 51 and 54 Habitats Regulations 2011**.[160] Article 51(2) in effect criminalises acts in breach of Article 12. Article 54 provides for derogation licensing.

110. Given the abandonment of Ground 1, the issue in the present case is not whether the Board breached any duties allegedly imposed on it by the Habitats Directive[161] in general or Article 12 or 16 in particular. Rather, Ground 2 asserts as to EIA that the facts that bats are present on Site and are a protected species to which the prohibitions listed in Article 12 of the Habitats Directive apply, bear on the considerations relevant to, and the adequacy of, Preliminary Examination for EIA such as to render the Preliminary Examination in this case deficient in law.

111. I have already addressed the relationship between EIA and protected species by reference to the explicit provisions of the EIA Directive as to biodiversity. The relationship between EIA and Articles 12 and 16 of the Habitats Directive has also been the subject of various judgments but seems to me established in **Namur Est**[162] **-** on which Shadowmill relies. In that case, the CJEU held that:[163]

- The scope of EIA is general.[164] It must be a full assessment and must occur before development consent is given to the project.[165] EIA must take full account of the effects that projects are likely to have on the environment – citing AG Kokott's opinion in the case.[166]
    - (Though not cited in Namur-Est, one can refer here also to **Kraaijeveld**[167] - cited by Shadowmill as to the "*wide scope and a broad purpose*" of the EIA Directive to ensure that projects that may have a significant effect on the environment are subjected to EIA.)

- Article 2 of the EIA Directive, in requiring EIA of certain projects, refers generally to their likely '*significant effects on the environment'*, without referring specifically to any one type of significant effect or excluding any other type of significant effect from its scope. Similarly, Article 3 refers generally to the '*direct and indirect effects'* of those projects on the environment.

160 European Communities Birds and Natural Habitats Regulations of 2011 (S.I. 477 of 2011).
161 More accurately, by its transposition to Irish Law.
162 Case C-463/20 Namur-Est Environnement ASBL v Région Wallonne & Cimenteries CBR SA (AG Opinion 21 October 2021 §47) (Judgment 24 February 2022).
163 Judgment §48 et seq.
164 Citing judgments of 12 September 1999, Commission v Ireland, C-392/96, EU:C:1999:431, paragraph 71; of 31 May 2018, Commission v Poland, C-526/16, not published, EU:C:2018:356, paragraph 72; and of 12 June 2019, CFE, C-43/18, EU:C:2019:483,paragraph 52.
165 Citing judgment of 3 March 2011, Commission v Ireland,C-50/09, EU:C:2011:109, paragraphs 76 and 77.
166 §44.
167 Kraaijeveld Case C-72/95.

- It follows that EIA must address, in particular, the significant effects that a project is likely to have on fauna.

- It follows that where a project requiring EIA also involves a derogation from Article 12 protections of protected species and so is likely to have an impact on those species, the EIA must address, in particular, that impact.

112. While, unlike in this case, a derogation licence was the occasion of the view taken by the CJEU in Namur-Est, it is clear that its underlying rationale derived from the derogation itself (i.e. the acts which would produce the environmental effect on protected species in breach of Article 12) as opposed to the licensing of it. That a derogation licence had been obtained in Namur-Est seems to me to have been significant primarily in establishing the prospect of a breach of Article 12 protections as, without such prospect, no derogation licence would have been required.

113. Having established the CJEU's view, in which AG Kokott was cited, and noting that her view was consistent with that taken by the CJEU, it is possible to consider her opinion as shedding further light on this relationship between EIA and species protection under Articles 12 and 16 of the Habitats Directive. Starting with the content of her opinion[168] explicitly cited by the CJEU, one notes that in EIA "*No exceptions are provided for certain environmental effects".* EIA "*covers all significant environmental effects, including, where relevant, significant effects on protected species*."[169] And she says, *"Member States may not exclude certain environmental effects and, in particular, adverse effects on species protected under EU law from the environmental impact assessment."*

114. AG Kokott continued in terms confirming both that it is the substance of derogations from Article 12 protections and the environmental impacts they produce, rather than their licensing under Article 16, which matters for EIA purposes and that such derogations are significant:

> *"….. derogations from the rules of EU law on the protection of species, that is to say, from the prohibitions under Articles 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive, must also be described. This is because <u>such derogations</u> from the requirements of EU environmental law <u>are significant by their very nature, irrespective of whether they should ultimately be justified under Article 16 of the Habitats Directive</u> or Article 9 of the Birds Directive."*[170]

115. **Jennings**[171] recently, but obiter, considered **Namur Est**[172] - inter alia to the following effect:

168 §44.
169 Citing judgments of 24 November 2011, Commission v Spain (Alto Sil) (C-404/09, EU:C:2011:768, paragraph 86) ; and of 7 November 2018, Holohan and Others (C-461/17, EU:C:2018:883, paragraphs 57 to 59) ; and her Opinion in the latter case (EU:C:2018:649, §§84 to 87).
170 Emphases added.
171 Jennings & O'Connor v An Bord Pleanála & Colbeam Ltd [2023] IEHC 14.
172 Case C-463/20 Namur-Est Environnement ASBL v Région Wallonne & Cimenteries CBR SA (AG Opinion 21 October 2021 §47) (Judgment 24 February 2022).

" …… in essence, Namur-Est requires that the environmental effects of carrying a derogation licence into effect be considered in EIA. ….. To put it another way, AG Kokott was of the view that environmental effect on protected species is not rendered insignificant, such as to render EIA unnecessary, by reason only of its being licensed by a derogation licence. AG Kokott also considered that where such an issue arises the authorities responsible for species protection must be involved in the EIA. ….. So, Namur-Est, at least generally, canvasses issues similar to the plea in the present case that the Inspector could not possibly have excluded by Preliminary Examination the requirement for EIA Screening where the Proposed Development will have an acknowledged impact on bats entitled by Article 12 of the Habitats Directive to strict protection."

"AG Kokott in Namur Est states that all likely significant effects of a proposed development, including effects on protected species and of derogations from their protection, must be considered in EIA. Hence, the potential for such effects must be considered in EIA Screening and in EIA Preliminary Examination. In turn, this may bear on the required content of reasons to be given in EIA, EIA Screening and in EIA Preliminary Examination."

116. AG Kokott in Namur-Est cited the judgment of the CJEU and her own opinion in **Holohan**.[173] In that case, the CJEU[174] approved certain of the content of AG Kokott's opinion[175] cited later by her in Namur-Est. In Holohan, considering specifically the "*examination of effects on species in the EIA"*[176], AG Kokott said:

"86. As to which effects are to be considered significant, a number of factors may be relevant. The key points of reference, however, are to be drawn from the legal protection of the elements of the environment concerned.

87. Thus, potential effects on species which are protected by the Habitats Directive (or by national law), for example, are, as a rule, to be regarded as significant[177] *and must therefore also be included in the information provided by the developer, even if only individual specimens are affected in the case in question.*[178]

……

91. In short, ….. in accordance with Article 5(3)(c) of the EIA Directive, the developer must provide the information necessary to identify and assess potential significant effects which the project may have on flora and fauna. The information required includes in particular the effects on protected species ……."

173 Citation above.
174 §58.
175 §§84 and 85 of her opinion.
176 §79 et seq of her opinion
177 Citing, Commission v Spain (Alto Sil/Spanish brown bear), C-404/09, judgment of 24 November 2011, §86).
178 Emphases added.

117. While the CJEU in Holohan did not need to address this expression of view by AG Kokott, her standing[179] in EU environmental law is very considerable. AG Kokott cited the decision of the CJEU in **Alto Sil/Spanish Brown Bear**[180] in support of her view. I have found that case a little difficult to understand in this precise context. While, unlike here, that case related to a European Site, the point seems to have been that the site designations were significant primarily as pointing up the protected status of two species for which the site had been designated - the capercaillie[181] and the brown bear.[182] It was their protected status which was seen by the CJEU in Brown Bear, and certainly by AG Kokott in Holohan, as requiring EIA of effects on those species. Accordingly, it does seem that AG Kokott is supported in her view by authority of the CJEU.

118. It seems to me that in the foregoing extract from the opinion in Holohan the striking observation is that, for EIA purposes, potential effects on protected species,[183] such as bats, "*are, as a rule, to be regarded as significant …….. even if only individual specimens are affected ...*" By "*as a rule*" AG Kokott clearly meant "*generally*" - as opposed to meaning a strict rule. I think AG Kokott's phrase "*as a rule*" implies a rebuttable presumption - that effects on protected species, within the scope of effect described in Article 12 of the Habitats Directive, are significant for EIA purposes.

119. As a general observation, the Board cannot in judicial review be presumed to have decided that such a presumption has been rebutted – that would be oxymoronic – it would reverse the presumption. Nor can a general presumption, such as that of the validity of an impugned decision, outweigh a specific presumption such as that at issue here. Of course it may be possible to infer from an interpretation, as a whole, of the Board's decision and the materials on which it is based that the Board has decided that the presumption has been rebutted. Inference is not presumption – it is an interpretive tool for discerning the true meaning of a decision.

120. It is fair to observe that Namur-Est and Holohan concerned EIA as opposed to a Preliminary Examination for EIA. But clearly the subject-matter of a Preliminary Examination for EIA must be of the same scope as that of EIA (though the depth of information to hand and of inquiry are lesser). Otherwise, how can Preliminary Examination for EIA reliably conclude, if it does, that EIA is not required because there is no real likelihood of significant effects? A narrower scope of inquiry in Preliminary Examination for EIA than in EIA would clearly allow the possibility of a determination in Preliminary Examination that EIA was not required in circumstances where an effect outside the scope of inquiry in Preliminary Examination but within a wider scope of inquiry in EIA might have proved significant - but would go unassessed despite the imperative of Article 2 of the EIA Directive.

121. The main point arising from the foregoing is that a decision-maker, even one having no competence under the Habitats Directive in strict protection of species, must in conducting an EIA

179 I avoid using the word "authority" only as it could be misconstrued in the Common Law of stare decisis.
180 Commission v Spain C-404/09.
181 Listed in Annex I to the Birds Directive.
182 Strictly protected as a priority species as listed in Annex IV to the Habitats Directive.
183 i.e. Protected by Article 12 of the Habitats Directive.

have regard to the nature, extent and requirements of strict protection of species under the Habitats Directive in considering for EIA purposes, the question of significant effect on the environment.

2 - Disturbance of Protected Species – Commission Guidance, Morge & Skydda Skogen

122. Shadowmill submits that the Inspector, in referring to the minimisation of disturbance, explicitly acknowledges residual disturbance of bats despite mitigation and that Article 12 of the Habitats Directive admits of no concept of de minimis disturbance. The submission is undermined by Shadowmill's own citation of the relevant Commission Guidance.[184]

123. In considering the Article 12(1)(b) prohibition on deliberate disturbance of species, the Commission Guidance records that:

> *"Any deliberate disturbance that may affect the chances of survival, the breeding success or the reproductive ability of a protected species, or that leads to a reduction in the occupied area or to relocation or displacement of the species, should be regarded as a 'disturbance' in line with the terms of Article 12."* [185]

The Guidance goes on to acknowledge that there is, in the Habitats Directive, no definition of disturbance, that the prohibition is not explicitly restricted to 'significant' disturbances, and that protection from disturbance is not limited to avoiding adverse effect on conservation status or to species which have not achieved favourable conservation status.

124. But the Guidance also says that the scope of protection from disturbance "*has to be interpreted in light of the Directive's overarching objective"* - which is to contribute to biodiversity through the conservation of, inter alia, fauna.[186] And *"Generally, the intensity, duration and frequency of repetition of disturbances are important parameters when assessing their impact on a species. Different species will have different sensitivities or responses to the same type of disturbance, which has to be taken into account."*[187] In the excerpt cited by Shadowmill, the Guidance invokes a "*case-by-case approach*" requiring the competent authority to *"reflect carefully on the level of disturbance that is to be considered harmful".* And that assessment must consider not merely "*the specific characteristics of the species*" but the "*situation*" – which I take to mean all relevant

184 Commission notice - Guidance document on the strict protection of animal species of Community interest under the Habitats Directive. Brussels, 12.10.2021 C(2021) 7301 final - "A case-by-case approach is therefore required, The competent authorities will have to reflect carefully on the level of disturbance that is to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above ... On the other hand, sporadic disturbances without any likely negative impact on the individual animal or local population, such as for example scaring away a wolf from entering a sheep enclosure in order to prevent damage, should not be considered as disturbance under Article 12."

185 §2.3.2. a) Deliberate disturbance.

186 Article 2(1).

187 For instance, the Commission states, repeated disturbance of cetaceans by whale-watching boats could lead to significant impacts on individual specimens, with negative consequences for the local population. On the other hand, sporadic disturbances without any likely negative impact on the individual animal or local population, such as for example scaring away a wolf from entering a sheep enclosure in order to prevent damage, should not be considered as disturbance under Article 12.

circumstances. So, *"sporadic disturbances without any likely negative impact on the individual animal or local population … should not be considered as disturbance under Article 12."* Thus, according to the Commission:

- not all "disturbance" colloquially so-called is disturbance within the meaning of Article 12 of the Habitats Directive.

- effect on the species and whether "negative impact" and/or "harm" are likely are relevant to the presence or absence of disturbance within the meaning of Article 12.

125. This view is broadly consistent with the decision of the UK Supreme Court in **Morge.**[188] The Court did not identify a minimum threshold for "*disturbance*" but did cite an earlier, arguably less demanding, version of the Commission's guidance.[189] For example, Lord Kerr[190] cited it to the effect that a "*certain negative impact likely to be detrimental must be involved*" – a phrase not found in the 2021 version. However, as long as it is borne in mind that the Commission Guidance Lord Kerr cited as "wise" was an earlier version and that its conclusions must be considered in light of **Skydda Skogen**,[191] **Morge** does seem to me useful**.**

126. Lord Brown recognised that "*the central difficulty in the case lies in determining the level of disturbance required to fall within the prohibition*". The "*broad considerations*" he identified as to Article 12(1)(b) were as follows:

- First, Article 12 protects specifically species, not habitats, although obviously, as in Morge, disturbance of habitats can indirectly impact on species.

- Secondly, "*and perhaps more importantly*", the Article 12(1)(b) prohibition of disturbance, in contrast to the Article 12(1)(a) prohibition on killing, *"relates to the protection of "species", not "specimens of …. species""*.

- Thirdly, whilst the word "significant" is omitted from Article 12(1)(b) — in contrast to Article 6(2) and Article 12(4)[192] — that cannot preclude an assessment of the nature and extent of the negative impact of the activity upon the species and, ultimately, a judgment as to whether that is sufficient to constitute a "disturbance" of the species.

- Fourthly, it is implicit in Article 12(1)(b) that activity during the period of breeding, rearing, hibernation and migration is more likely to have a sufficient negative impact on the species to constitute prohibited "disturbance" than activity at other times.

188 R(Morge) v Hampshire County Council [2011] 1 WLR 268. See also, Simons on Planning Law 3rd Ed'n (Browne) §15–895 et seq. A planning permission for a bus route was impugned. Natural England had withdrawn its objection when an updated survey found no bat roosts.
189 February 2007.
190 Dissenting on other issues.
191 Below – as to protection of "specimens" - individual members of the species.
192 which envisages accidental capture and killing having "a significant negative impact on the [protected] species".

The concept of sufficiency of negative impact to constitute prohibited disturbance seems to me illuminatory.

127. Lord Brown next said: "*Beyond noting these broad considerations it seems to me difficult to take the question of the proper interpretation and application of article 12(1)(b) much further than it is taken in the commission's own guidance document ..*" However he did later identify further considerations to be borne in mind:

- He cited the Commission as to the need to "*reflect carefully on the level of disturbance to be considered harmful*".

- "*Consideration should … be given to the rarity and conservation status of the species in question and the impact of the disturbance on the local population of a particular protected species.*

- *Individuals of a rare species are more important to a local population than individuals of more abundant species.*

- *Similarly, disturbance to species that are declining in numbers is likely to be more harmful than disturbance to species that are increasing in numbers.*"

- " …. *disturbance of animals includes in particular any disturbance which is likely (a) to impair their ability (i) to survive, to breed or reproduce, or to rear or nurture their young, or (ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or (b) to affect significantly the local distribution or abundance of the species to which they belong*." [193]

- *"Note, however, that disturbing activity likely to have these identified consequences is included "in particular" in the prohibition; it does not follow that other activity having an adverse impact on the species may not also offend the prohibition."*

128. Lord Kerr observed that "*Not every disturbance will constitute a breach of the article*" - by which I understand him to mean that not every disturbance in the colloquial sense of that word will constitute disturbance in the sense in which the word is used in Article 12. Accordingly, *"The nature and extent of the disturbance must be assessed on a case by case basis."* Lord Kerr considered that *"Trying to refine the test[194] beyond the broad considerations identified by Lord Brown JSC and those contained in the commission's guidance document is not only difficult, it is, in my view, pointless."*

129. As stated, Lord Brown in the UK Supreme Court in **Morge**[195] had "*importantly*" contrasted the Article 12(1)(b) prohibition of disturbance of "species", with the Article 12(1)(a) prohibition on

193 Citing Regulation 41(2) of the UK Conservation of Habitats and Species Regulations 2010 - SI 2010/490.
194 i.e. of disturbance.
195 R (Morge) v Hampshire County Council [2011] 1 WLR 268. See also, Simons on Planning Law 3rd Ed'n (Browne) §15–895 et seq.

killing, "*specimens of …. species*". In **Skydda Skogen**[196] the CJEU was clear that Article 12 proscribes killing of "*specimens*" and destruction or taking of eggs (Article 12(1)(3))at the level of individual members of the species. However the CJEU, in considering the second question in that case, which related to "*Article 12(1)(a) to (c)*":

- Took "*Articles 12(1)(a) to (c)"* together when stating that those prohibitions are not limited by any criterion of likelihood of their breach resulting in adverse effect on the conservation status of the species and do not cease to apply to species which have attained a favourable conservation status.*[197]*
    - To put it crudely, and as applicable here, bats are just as strictly protected by Article 12 whether plentiful or scarce.

- Gave as its reason for that conclusion that any other would be inconsistent with *"the precautionary principle and the principle of preventive action … or with the increased level of protection for the specimens of the animal species and eggs covered by Article 12(1)(a) to (c) of the Habitats Directive."[198]*

- But notably, and hardly accidentally, the CJEU used a different phrase - *"Article 12(1)(a) and (c)"*- thereby omitting Article 12(1)(b) as to disturbance - when citing the need for assessment at the level of individual members of the species – which need "*flows from the very wording of that provision[199], which requires the Member States to prohibit certain acts affecting 'specimens' or 'eggs' of the animal species."*[200]

130. It seems clear therefore that Lord Brown in **Morge**[201] and the CJEU in **Skydda Skogen**[202] both "*importantly*" contrast the Article 12(1)(b) prohibition of disturbance of "species", with the Article 12(1)(a) prohibition on killing, "*specimens of …. species*" such that disturbance of individual specimens is not, at least necessarily, contemplated by Article 12(1)(b) and disturbance may properly be considered in terms of effect on "local populations" of the species concerned. Though that does not rule out the possibility that, in a particular case, disturbance of a protected specimen (for example of a very rare species) could be harmful to its species such as to fall within the prohibition of Article 12(1)(b).

131. None of this is to suggest direct duties of the Board, on foot of the Habitats Directive, as to strict protection. However, it is to suggest the scope of what may be considered significant effect for EIA purposes given the view taken in **Namur Est**[203] that any effect prohibited by Article 12 is, for EIA purposes, likely significant by its very nature.

196 Föreningen Skydda Skogen (C-473/19) Judgment of 4 March 2021 – as it happens a tree-felling case, though not concerned with bats.
197 §60.
198 §60.
199 The phrase "that provision" is inelegant in context but must refer to "Article 12(1)(a) and (c)".
200 §54.
201 R(Morge) v Hampshire County Council [2011] 1 WLR 268. See also, Simons on Planning Law 3rd Ed'n (Browne) §15–895 et seq.
202 Föreningen Skydda Skogen (C-473/19) Judgment of 4 March 2021 – as it happens a tree-felling case, though not concerned with bats.
203 Case C-463/20 Namur-Est Environnement ASBL v Région Wallonne & Cimenteries CBR SA (AG Opinion 21 October 2021 §47) (Judgment 24 February 2022).

132. Three observations particular to disturbance of protected species as a consideration in EIA are relevant:

- Risk of harm is a criterion of disturbance.

- Framing the test of significant effect by disturbance, in EIA generally, and specifically in Preliminary Examination, in terms of effect on "local populations" of the species concerned is acceptable.

- Disturbance of individual specimens is not, at least necessarily, contemplated by Article 12(1)(b) – though that does not rule out the possibility that, in a particular case, disturbance of a protected specimen could be harmful to its species such as to fall within Article 12(1)(b)

2 - Bat Report & Arboricultural Report & Inspector's Report

133. The Bat Report for Lilacstone was prepared by named ecologists of JBA Consulting assertedly in accordance with applicable and listed bat survey guidelines and explicitly applying the precautionary principle as "*used at all times*". Generally, assumptions underlying and the limitations of the survey were identified. It described its survey and assessment methodology. The report identified all bats as protected species under Annex IV of the Habitats Directive.[204]

134. The Bat Report noted the intended conservation, renovation and alteration of Stone Villa. It later refers to "*a large derelict building in the south*" of the site. This can only be Stone Villa. The report erroneously contemplates its demolition – which is not intended. However that error seems to me necessarily to represent a worst-case scenario consistent with the application of the precautionary principle, so nothing turns on the error. The Bat Report also noted the intended "*removal of 13 trees of variable maturity and condition*" and a tree removal plan drawing from the Arboricultural Report for Lilacstone is appended to the Bat Report.

135. The Site has a Bat Conservation Ireland 'habitat suitability' index of 18.89 on a scale from 0-100 where 100 is most favourable for bats. Nonetheless, the Site is considered suitable as foraging habitat for bats. The survey confirmed the presence of 3 commuting and foraging bat species[205] on site. Commuting and foraging bats were frequently seen around Stone Villa.

204 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.
205 Lesser Noctule, Common Pipistrelle and Soprano Pipistrelle. The national populations of all three are described as significantly increasing.

136. A Potential Roost Feature (PRF) assessment of trees and buildings was conducted from the ground only "*which meant that not all PRFs could be identified*". Thereby it clearly implies that some form of survey of the building itself would have been at least preferable. As to roosts, the derelict Stone Villa displayed numerous potential bat roosting features "*including cracks in the walls and window frames*". The interior of Stone Villa was not inspected. We are not told why not or what value such an inspection would have been – for example, in observing the presence or absence of bats, bat droppings or the like. A bat emergence survey focused on Stone Villa was done on one evening in September 2019, and a static bat detector, was deployed near the building for three nights in September 2019. Despite the commuting and foraging bats frequently seen around Stone Villa, in the emergence survey no bats were seen emerging from it.

137. The report identified "*a few mature trees in the north*" "*that could provide potential roosts*". One, a Sycamore, had "*some bat roosting features*". It said that of the 15 trees for removal, only that Sycamore[206] had roosting potential. However the report also, and no doubt properly, states that an additional limitation of the PRF assessment "*was due to the time of year; the trees were in full leaf and the foliage may have obscured potential roost features."* Only one other tree[207] is for removal in that north eastern corner. The report does not state if it is one of those to which the identified possibility of having missed a potential roost applied. Indeed, none of the trees to which this observation applied are identified. However, as the Bat Report specifically identified only "*a few mature trees in the north*" "*that could provide potential roosts*" and as it identified no such potential elsewhere, it seems clear that any risk of roost destruction arises only as to removal of trees in that northern area of the site. This is a significant observation given the omission of Block B.

138. The Arboricultural Report[208] does not mention bats but its method statement states that *"It is the responsibility of the arboricultural contractor to ensure that no protected species are harmed whilst carrying out site clearance or tree surgery works."* It gives no information as to whether or how that responsibility can be met.

139. As stated, the Bat Report erroneously contemplates the demolition of Stone Villa. Hence, it necessarily assumes destruction of the "*numerous potential bat roosting features*" in Stone Villa identified in the Report. However, given the derelict state of Stone Villa and its intended renovation to apartments and given also that the identified numerous potential roost features included such as *"cracks in the walls and window frames*", which would have to be attended to in any renovation, I doubt that the Bat Report disadvantaged Lilacstone in any real way by assuming demolition. It seems inevitable that the intended renovation will destroy at very least some of the numerous potential roost features identified and, indeed, at least some of the further potential roost features not identified in the "*from the ground only*" survey. As stated, presumption of demolition is at least consistent with application of the precautionary principle.

206 It can be identified in the Report as Tree T172.
207 T173, an Elder.
208 by Charles McCorkell.

140. Importantly, it is clear that even though the Bat Report records no bats seen on the one survey done looking for bat emergence from Stone Villa, it clearly considers that the destruction of potential roost features in Stone Villa *"would be direct impact on the three local bat species in terms of their roosting capabilities in this area".* While not expressly stated, identifying destruction of potential roost features in Stone Villa as a "*direct impact*" implies the application of the precautionary principle by way of a presumption, not least, that at least some of the potential roost features are actually used as roosts or likely to be used as roosts and will be destroyed.

141. Accordingly, I cannot accept the submission by counsel for the Board that *"There's no suggestion that there are any roosts there. There is no suggestion that any roosts are actually going to be disturbed."*[209] In short, it seems to me that the Bat Report is to the effect that it is necessary to presume on a precautionary basis that the Permitted Development will destroy bat roosts in breach of Article 12(1)(d) of the Habitats Directive.

142. Of course that may prove not to be the case. There may be no bat roosts in Stone Villa. But the precautionary presumption that there are bat roosts there is forced on Lilacstone by the limitations of its own Bat Survey (limitations, the Report records, imposed "*In order to achieve the objectives of the report and surveys within the time period of the commissioning of work and the planning submission*") and that presumption is made explicit accordingly by its own consultants.

143. The report is a little unclear to me as to the difference posited between direct and indirect impact on bats of destruction of bat roosts. But the essential point seems to be that, by reason of the removal of potential roosts, bats already on Site or returning to it will have to waste energy and incur physiological stress in finding new roosts and foraging ground unless suitable alternative roosts are available nearby. By way of mitigation therefore, a "*minimum*" of six bat boxes should be installed in suitable locations on-site to compensate for the loss of potential bat roosts.

144. It is clear from the report that, as they do not have a reliable quantification of bat roosts on site, the authors cannot quantify the number of roosts presumptively to be destroyed or, beyond a best-case scenario, the number of bat boxes required in mitigation. However bat boxes are not complex, unusual or expensive technology. There seems to me no reason to infer that the numbers and locations of bat boxes ultimately required will pose any difficulty – either of assessment or provision. It seems obvious that, to the extent possible, they will be erected in advance of any destruction of bat roosts.

145. Other than the bat boxes, the Bat Report contains nothing by way of prescription of precautionary or mitigatory measures to be taken during the construction works on Stone Villa. In

209 Day 3 p36.

other such reports one sees reference to such as further expert examinations immediately prior to works, timing of works having regard to hibernation or breeding seasons,[210] method of performance of such works, ecological supervision of any such works or observations as to the prospect of any need for a Derogation Licence[211] to permit such works. However, no plea was directed to this potential issue. The plea as to mitigation is simpler and more fundamental – that taking mitigation into account in Preliminary Examination is impermissible.

146. As a separate matter, development without mitigation would directly impact bat commuting and foraging as bats won't enter intensely lit areas. JBA recommended external lighting design suitable for bats[212] and recommended mitigation at dusk - peak bat feeding time – by switching off lights, lowering light output and using occupancy/motion sensors to keep lights off absent pedestrian traffic. JBA stated that all recommendations have been strictly incorporated into all relevant aspects of the lighting design and they will ensure no aversive behaviour by bats. I consider that I can take judicial notice as a judge sitting in the SID list dealing with numerous similar cases, that at least in general terms such mitigation is standard, if not invariable, practice in developments such as this.

147. The "Conclusion & Recommendations" of the Bat Report[213] requires careful reading.

- It concludes that *"Should the proposed site development be permitted without any bat mitigation measures in place, these three species would be adversely impacted. To avoid such Impacts, the mitigations measures outlined in the following sections should be strictly adhered to."*

- While the recommended main mitigation measures which follow include the provision of bat boxes the introduction is specifically framed in terms of ensuring *"that bats' foraging and commuting in the area continued unhindered".* This relates to disturbance as opposed to destruction of resting places.

- Under that heading it recommends "*given the demolition of the derelict building*" that *"a minimum of six bat boxes should be installed on-site to compensate for the loss of potential bat roosts."*

- It makes various recommendations as to lighting design and management in mitigation of effect on foraging and commuting bats.

210 See below an excerpt from the relevant EU Commission Guidance in this regard.
211 Pursuant to Article 16 of the Habitats Directive.
212 The report recommends the lowest light levels permitted having regard to health and safety requirements. The specification and colour of light treatments, such as single bandwidth lights / no UV light, would allow bats are not to be affected by the broad visible or blue light. LED luminaires are ideal and should be used where possible due to their sharp cut-off, lower intensity, and dimming capability. A warm white spectrum (ideally less than 2700K) should be used to reduce the blue light component. The LED luminaires could also feature peak wavelengths higher than 550nm to avoid the component of light most disturbing to the Bats. The report also recommends minimising light spillage by restricting lamp column heights to 6m.
213 §5.1 et seq.

- Under a heading "Review"[214] explicitly specific to "*lighting design*"[215] it is said that lighting design and management *"will ensure no aversive behaviour"* by bats and *"Therefore, the proposed development is not anticipated to have any adverse impacts on the populations of these local bat species."* This conclusion is explicitly limited to mitigation in lighting design and management and addresses the Article 12(1)(b) issue of disturbance.

- There is no similar conclusion specific to the efficacy and result of mitigation of other effects on bats as to destruction of roosts in breach of the Article 12(1)(d) prohibition on destruction of resting places of protected species. There is no such conclusion as to either the immediate effect of the act of their destruction or as to the efficacy of the bat boxes in mitigating its aftermath.

148. I have already described the laconic consideration of bats by the Inspector. She noted the Bat Report's content by reference to mitigation proposed to "*minimise disturbance"* and her analysis as to this protected species consisted only of the words "*I consider this to be adequately addressed*."

2 - EIA - Bats - Shadowmill's Pleadings & Submissions

149. The amended Statement of Grounds is somewhat complex as many paragraphs of the pleaded particulars relate to more than one ground and they were typographically mislabelled in that regard. §§E(b) 1 to 11 relate to both Grounds 1 and 2. Ground 1 was abandoned. It alleged essentially, breach by the Board of duties alleged to have arisen as to bats under the Habitats Directive and the Wildlife Act 1976. But §§E(b) 1 to 11 remain effective as particulars of Ground 2 as to breach by the Board of duties as to bats alleged to have arisen under the EIA Directive. Generally, I reject Lilacstone's submission to the contrary.

150. Shadowmill pleads[216] and submits "four points" as to bats. The first two were as follows:

i. The inadequacy of the survey and hence the inadequacy of the information before the Board. Neither the interior of Stone Villa nor the trees were inspected for roosts other than externally and from the ground (while the trees were in leaf).

ii. Non-compliance with the NPWS Bat Mitigation Guidelines for Ireland 2006 – including the failure to survey the interior of Stone Villa and conducting one survey only and in September when the guidelines recommend *"Several dawn or dusk surveys spread over a period of several weeks from June to August .."*. The survey was *"clearly insufficient".*

[214] §5.3.
215 §5.3 - Review of the proposed development's incorporation of bat mitigation into lighting design
216 Amended Statement of Grounds §§Eb) 1-11.

151. However counsel for Lilacstone submitted[217] that, in conceding Core Ground 1, Shadowmill conceded *"any challenge in relation to the adequacy of the information that was furnished in the bat survey, so he is not inclined to rely on that to support any claim in relation to a failure to properly carry out a preliminary examination in relation to bats."* In reply, counsel for Shadowmill said[218]

> *"I'm not pursuing the grounds criticising the Bat Report, but what one can say is that the evidence on the use of the house seemed to be based on an emergence survey. They didn't go inside the house looking for bat roosts, but they did accept there was a possibility that it was suitable for bat roosts and it was this potential impact that was going to lead to the mitigation measures, including the bat boxes, which are synonymous with the risk disruption of bat roosts."*

152. This seems to me to amount to a sensible recognition by Shadowmill that whatever might have been said as to the adequacy or otherwise of the bat survey was, in practical terms, rendered unnecessary given JBA's precautionary presumption, described above, that there are bat roosts and that they will be destroyed. Of the four, that leaves standing Shadowmill's other two points:

iii. The Board impermissibly relied in Preliminary Examination on mitigation as to strictly protected species – the utility of which mitigation to preclude significant effects on bat fauna is unverified – citing **Moorburg**.[219]

iv. The Board relied on a bat report which inadequately considered only whether the proposed development would affect the "*local populations*" of bats whereas Articles 4 and 12 of the Habitats Directive require strict protection of individual bats – citing ***Commission v Poland*** **Case C-441/17**.

153. But Shadowmill also pleads that,

- Stone Villa was noted in the Bat report as "*having numerous potential bat roosting sites. The Report noted, incorrectly, that Stone Villa was due to be demolished and that this demolition and the removal of trees with roost potential on site would have an impact on bats".* [220]

- *"given the acknowledged presence of bat fauna as identified above, the failure to properly assess those impacts, and the significant potential impacts on species entitled to strict protection pursuant to Article IV of the Habitats Directive, the Board's conclusion of no significant effect was wrong in law, irrational and unreasonable and/or incompatible with (the) EIA Directive."* [221]

217 Day 3 p142.
218 Day 4 p62.
219 Commission v Germany (Moorburg Power Plant) Case C-142/16.
220 Grounds §E(b)12
221 Grounds §E(b)1

154. Shadowmill says that for purposes of EIA an effect prohibited by Article 12 of the Habitats Directive is significant by its very nature, citing AG Kokott and the CJEU in **Namur Est**[222] - to which I have referred above.

155. Shadowmill also says that in recording that mitigation will "*minimise"* disturbance of bats, the Inspector necessarily acknowledged at least a potential residual disturbance in breach of **Article 12 Habitats Directive**, such that a conclusion in Preliminary Examination of no real likelihood of significant effect was not open to her. To this end Shadowmill says as there is no de minimis threshold in Article 12(1)(b)[223] and so all loss of roosts and all disturbance is prohibited. Shadowmill cites the Commission Guidance[224] for its example of indirect disturbance: *"by forcing them to use lots of energy to flee: bats, for example, when disturbed during hibernation, heat up as a consequence and take flight, so are less likely to survive the winter due to high loss of energy resources)."* It further cites the Guidance – including for the necessity that a case-by-case approach is required and *"The competent authorities will have to reflect carefully on the level of disturbance that is to be considered harmful …"* and to the effect that that *"…sporadic disturbances without any likely negative impact on the individual animal or local population, …. should not be considered as disturbance under Article 12."* As I have said, these citations themselves undermine the proposition that there is no de minimis threshold for disturbance – at least if the proposition is that even harmless disturbance is prohibited.

156. Shadowmill also:

- Cites **Kraaijeveld**[225] for the "*wide scope and a broad purpose*" of the EIA Directive to ensure that projects that may have a significant effect on the environment are assessed prior to their being granted development consent.
  - That seems to me uncontroversial.

- Notes that small projects can have a significant effect on the environment.[226]
  - I agree,[227] but that does not imply that project size is irrelevant. Indeed it is a factor to which "*particular regard*" is to be had in determining if EIA is required.[228] I have addressed this issue above.

- Cites **WWF/Bozen**[229] for the proposition that *"It is for the national court to review whether, on the basis of the individual examination carried out by the competent authorities which resulted in the exclusion of the specific project … from the [EIA] procedure … those authorities correctly*

222 Case C-463/20 Namur-Est Environnement ASBL v Région Wallonne & Cimenteries CBR SA (AG Opinion 21 October 2021 §47) (Judgment 24 February 2022).
223 Deliberate disturbance of species.
224 Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92143/EEC" (2021) pp.27.
225 Kraaijeveld Case C-72/95.
226 Commission v Ireland (Case C-392/96) – see above.
227 As stated above.
228 Explicitly so deemed by Annex III of the EIA Directive and Schedule 7 PDR 2001.
229 Case C-435/97 World Wildlife Fund v. Autonome Provinz Bozen (Court of Justice of the European Union, 16th September, 1999, ECLI:EU:C:1999:418), §48.

assessed, in accordance with the Directive, the significance of the effects of that project on the environment".

- That is undoubtedly so, but in the 23 years since **WWF/Bozen** was decided it has not been interpreted as requiring that judicial review of EIA procedures amounts to appeal on the merits as opposed to a test of legality. Any judicial decision so reading it could be made only on far more detailed argument than occurred in the present case.

- Suggests that **Eco Advocacy**,[230] to the effect that mitigation can be considered in EIA Screening, does not apply to Preliminary Examination – especially where the Bat Report does not address the screening criteria set out in Annex III of the EIA Directive. It cites by analogy **Gillespie**[231] as to EIA Screening.

- Cites the requirement to apply the precautionary principle – so that the risk of significant effect to the environment exists when it cannot be objectively excluded – citing the **Polish Case C-526/16**.[232]

2 - EIA - Bats - The Board's & Lilacstone's Pleadings & Submissions

157. Other than traverses, the Board pleads that the adequacy of the Bat Report (including the surveys recorded therein) is a matter of planning judgment for the Board.

158. The Board cites Recital 11 and Article 4.4 of the EIA Directive, **MRRA**[233] and **Eco Advocacy**[234] to the effect that consideration of mitigation is now "baked in" to EIA Screening. One may add Annex III §3.h to the list. It submits that the same logic applies to Preliminary Examination as to EIA Screening and that the wording of Article 109 PDR does not exclude consideration of mitigation in Preliminary Examination.

159. The Board seeks to distinguish Namur Est as a case in which a derogation licence had been sought and the project required full EIA. In the present case, it says,

- The Bat Report concluded that, by strictly adhering to the mitigation recommended, the Proposed Development would not have *any* adverse impacts on the population of the three identified local bat species.
  - In fact, it drew that conclusion only as to the lighting issue.

230 [2021] IEHC 610 by reference to Articles 4(4) and 4(5) as well as annex III, §3(h) of the EIA Directive.
231 Gillespie v First Secretary of State [2003] 3 PLR 20 – cited sub nom. Bellway Urban Renewal Southern v Gillespie [2003] EWCA Civ 400 §§36-37. Note - it predates the 2014 amendment to the EIA Directive.
232 Commission v Poland, Case C-526/16 §67. This judgment is not available in English but is cited to this effect in Case C-721/21 Eco Advocacy CLG Opinion of Advocate General Kokott delivered on 19 January 2023 and in case C-575/21Wertinvest Hotelbetrieb Opinion of Advocate General Collins delivered on 24 November 2022.
233 Monkstown Road Residents' Association v An Bord Pleanála [2022] IEHC 318 at §167.
234 Eco Advocacy v An Bord Pleanála [2021] IEHC 265.

- The Board concluded that, with the implementation of mitigation measures, the impact on bats had been adequately addressed. No evidence has cast doubt on the adequacy of the mitigation proposed as to bats.

- There was no evidence that a derogation licence would be required.
  - It seems to me that there was no evidence a derogation licence would be required because the Bat Report simply ignored the entire issue of disturbance of bats and possible destruction of roosts during works on Stone Villa and during and by way of tree removal.
  - Accordingly, I give no weight to this observation by the Board.
  - But as Shadowmill did not plead the issue, I can give no weight either to any failure of the Bat Report in that regard in considering its claim for certiorari.

160. Lilacstone's submissions are as follows:

- It is not clear whether Shadowmill asserts that because bats are entitled to strict protection, any proposed development likely to affect bats automatically requires EIA. If so, every application site where bats were present would, *ipso facto*, require a full EIAR as to the effects of the proposed development on all other aspects of the environment. Such an extreme proposition is unsustainable.

- If, on the other hand, Shadowmill asserts that the effects of the Proposed Development on bats is significant, it has not produced any evidence to demonstrate such significance. Shadowmill is, therefore, only entitled to challenge the lawfulness of the Preliminary Examination for EIA[235] on the basis of the alleged "*failure to properly assess those impacts*".

2 – EIA - Interpretation of the Inspector's report as to Bats – in light of the Bat Report

161. In interpreting the Inspector's report as to disturbance of bats, I should have regard to the **Commission Guidance** and **Morge** as to the meaning of disturbance for purposes of Article 12 of the Habitats Directive as requiring harm. The Inspector's relegation of the issues of protected species such as bats to the "Other Issues" section of her report - as opposed to dealing with it in the EIA Screening Section – is surprising and regrettable. Given the importance of protected species to the issue of EIA and the obvious necessity that Preliminary Examination address the issue where it arises (even if only by brief cross-reference to substantive content elsewhere in the report), that the issue was addressed other than under the rubric of EIA Preliminary Examination is arguably vulnerable to the inference that the Inspector failed to appreciate it as an EIA issue. I may be taking the principle of interpreting an Inspector's report as a whole to somewhere near its limit. However, I am prepared to take it that far in this case.

235 The submission refers to an EIA screening determination, but the meaning is clear.

162. In the context of her conclusion that the issue of Bats is "*adequately addressed*", it seems to me that the Inspector's use[236] of the words "*minimise disturbance*", while perhaps unfortunate, is to be understood, in the light of Morge and the Commission's Guidance and in light of the Bat Report's conclusion that lighting mitigation would ensure no adverse impacts, as a conclusion that no harmful disturbance would ensue from lighting the development such as would engage Article 12 protections and thereby constitute a significant environmental effect requiring EIA.

163. In interpreting the Inspector's report as to destruction of habitats of bats – bat roosts – it seems to me that in referring to mitigation by provision of "roost boxes" she must be understood as having read and interpreted the Bat Report, as it must be interpreted in accordance with the precautionary principle, to the effect that it is probable that Bat Roosts in Stone Villa will be destroyed by the Proposed Development.

164. She also in fact read it to the effect that the provision of bat boxes will mitigate that risk to the point at which it can be said that there is no real likelihood of significant effect. But whether that is to correctly read the Bat Report is another matter.

2 - EIA - Bats – Adequacy of Preliminary Examination - Decision

165. Given Namur-Est, and the terms of the EIA directive as to biodiversity, the question for EIA purposes (including Preliminary Examination) of the likelihood of significant effect on protected species must be considered in the context of the strict protection afforded by Article 12 of the Habitats Directive. This is not to suggest that Article 12 of the Habitats Directive directly imposes duties on the Board (in this regard, Ground 1 was abandoned). It is to recognise that the Board's performance of its duties as to EIA must take strict protection of species into account when considering the likelihood of significant effect on fauna. Thus, "*adverse impacts*" must be understood as encompassing, as contemplated by Article 12:

- deliberate capture or killing of specimens of these species,
- deliberate disturbance of these species,
- deterioration or destruction of breeding sites or resting places.

166. Lilacstone's submissions are misconceived. In these proceedings, Shadowmill need not and do not assert that because bats are entitled to strict protection, any proposed development likely to affect bats automatically requires EIA. Lilacstone's "*extreme proposition*" that Shadowmill's case requires "*full EIAR as to the effects of the proposed development on all other aspects of the environment*" is a straw man. Shadowmill need merely assert that the Preliminary Examination done in this case was an inadequate basis for a conclusion that *"no real likelihood of significant effects on*

236 Inspector's report §8.11.1.

the environment arising from the proposed development"[237]*.* The consequence of a proper Preliminary Examination might only be that EIA Screening was required. And even if EIA is required, it can be scoped to address only likely significant effects. As a judge hearing cases such as this, it is easy to form the impression (whether or not correct) that bats are endemic in Ireland and an impediment to very many developments. But even if so, that does not allow disregard of the legal position that bats are in law entitled to strict protection pursuant to Article 12 the Habitats Directive and, as **Namur Est** makes clear, that is a consideration in EIA and, hence, in Preliminary Examination for EIA. It follows that Shadowmill need not assert, much less produce evidence, that the effects of the Proposed Development on bats will be significant.

167. Were I the inspector, I might well have found the failure to inspect the interior of Stone Villa for the presence of bats distinctly unimpressive – not least given the identification of numerous potential roosting features on its exterior and the acknowledgement that inspection from the ground only was likely to have missed potential roosts. I might have thought worthy of further inquiry the observation in the Bat Report that assumptions had to be made "*In order to achieve the objectives of the report and surveys within the time period of the commissioning of work and the planning submission*" (developers should be expected to bespeak expert reports in a timely manner) – though it is recorded that the precautionary principle was applied at all times, including in the assumptions made by JBA. I might also have sought clarity as to the works intended for the locations of those potential bat roosts (once identified) and the resultant effect thereon. But I am not an expert in such matters and in any event, and as Humphreys J observed in **Holohan**,[238] I "*cannot decide that the exercise by a decision-maker of a discretion, or a finding as to fact, is simply wrong (or even clearly wrong) on the merits, if there is material to support it".* The Board is correct in pleading that the adequacy of the Bat Report (including the surveys recorded therein) is a matter of planning judgment for the Board. And, in any event, the challenge to the adequacy of the Bat Report is not pursued.

168. Non-compliance with the NPWS Bat Mitigation Guidelines for Ireland 2006 is not, per se, a legally cognisable plea. Unsurprisingly the plea was not pressed.

169. Shadowmill's pleadings do not impugn the Impugned Permission, as to Preliminary Examination for EIA,

- for want of reasons or reasoning.
- on the basis of a failure to identify any risk of disturbance or destruction of bats or bat roosts during tree felling.
- on the basis of a failure to identify mitigation measures to be applied during tree felling.

Of course, that makes sense as the omission of Block B means that the prospect of destruction of Bat Roosts by tree-felling in the northern part of the Site no longer arises as the Impugned Permission does not authorise their felling.

237 Art 109(2)(b)(i) PDR 2001.
238 Holohan v An Bord Pleanála [2017] IEHC 268.

170. Neither do Shadowmill's pleadings impugn the Impugned Permission on the basis of a failure to identify that a derogation licence as to bat removal from Stone Villa might be required in due course.

EIA - Bats - Mitigation in Preliminary Examination

171. Shadowmill cites **Moorburg**.[239] In that case the operation of a proposed power plant on the bank of the river Elbe, within the port of Hamburg, was to involve killing migrating fish by the drawing of large quantities of river-water into its cooling system. As to Appropriate Assessment under the Habitats Directive relating to an upstream European Site,[240] the developers proposed to compensate for the fish kills by installing a fish ladder at an upstream weir to assist migrating fish to reach their breeding areas, thereby increasing fish stocks. The impact assessment contained no definitive data as to the effectiveness of the fish ladder and stated that its effectiveness could only be confirmed by several years of monitoring – which monitoring was proposed. The CJEU held that the effectiveness of compensatory measures in guaranteeing beyond all reasonable doubt that that plant would not adversely affect the integrity of the European Site must be known at the date of the development consent decision. I accept that, by analogy, this reasoning also applies to mitigation measures considered in EIA – and by extension in EIA Screening and Preliminary Examination.

172. That reasoning seems to me consistent with the reasoning in **Jennings**[241] which recently considered, obiter,[242] the question whether mitigation could be considered in Preliminary Examination for EIA. Having examined authorities including **Gillespie**[243] (which Shadowmill cites) the conclusion was:

> *"… that there is no objection in principle to taking mitigation into account in Preliminary Examination as suggesting that EIA Screening (and EIA) is not required. However that must be done in accordance with the precautionary principle and bearing in mind that exclusion of EIA Screening and EIA at Preliminary Examination stage is reserved for obvious cases. Gillespie is authority that such a conclusion will, at least generally, require that the nature, availability and effectiveness of mitigation are already plainly established and plainly uncontroversial."*

173. This view seems to me consistent also with the view of mitigation in AA Screening taken by AG Kokott in her recent opinion in **Eco Advocacy**.[244] The context of AA Screening is arguably somewhat different given consideration of mitigation is now explicitly "baked in" to EIA Screening.[245] But AG Kokott considered that any consideration of mitigation measures in AA Screening would generally have to be based on sufficient practical experience of such measures.

174. I see no rationale for excluding consideration of mitigation from Preliminary Examination. As long as it is clearly understood that, for the presence of mitigation to justify ruling out EIA in Preliminary Examination, the level and reliability of knowledge of the effectiveness of such mitigation

239 Commission v Germany (Moorburg Power Plant) Case C-142/16.
240 within the meaning of Article 6(3) of the Habitats Directive.
241 Jennings & O'Connor v An Bord Pleanála & Colbeam Ltd 2023 IEHC 14.
242 The issue had become moot in that the trees which might have contained bat roosts had already been removed.
243 [2003] 3 PLR 20 – cited sub nom. Bellway Urban Renewal Southern v Gillespie [2003] EWCA Civ 400 §§36-37. Note - it predates the 2014 amendment to the EIA Directive.
244 In Case C-721/21 Eco Advocacy CLG Opinion of Advocate General Kokott delivered on 19 January 2023.
245 Eco Advocacy v An Bord Pleanála [2021] IEHC 265.

must be assessed as sufficing to support any conclusion that EIA Screening is unnecessary on the basis that there is no real likelihood of significant effect.

175. While I do not purport here to lay down a rule to bind the Board and the matter will, at least in the first instance, be one for its expert judgment, it seems to me that developers might wisely assume that recourse to bland reassurance, such as that the measures in question are "standard", without rationalising their reassurance or invoking the evidence-base for such reassurance, may not suffice in a particular case. And while familiarity and predictability of outcome may understandably tend to shorthand in reports and decision-making, the necessity for information, analysis and reasons adequate to the particular case should not be overlooked.

176. Here Shadowmill plead that the effectiveness of bat boxes and reduced lighting has not been generally assessed. However, it seems to me that the Applicant's case fails on that specific issue for want of any evidence even raising an issue as to the efficacy of mitigation of a kind generally well-known to, and presumably understood by, the expert Board. Perhaps those presumptions could be upset in a particular case, in submissions to the Board and/or evidence to the Court, but that has not been achieved in this case. However, as will be seen, that is not the end of the issue as to efficacy of mitigation.

EIA - Bats - Mitigation - Minimisation of Disturbance

177. Shadowmill impugns the Inspector's conclusion that mitigation will "*minimise*" disturbance of bats as inconsistent with a conclusion of no significant effect. I have already observed that Shadowmill is incorrect, at least in substance, in submitting that there is no concept of de-minimis disturbance. As to form, it may be that the concept of "de-minimis" may not be the most apt. But what is clear is that disturbance within Article 12 consists of something more than mere disturbance as that might be colloquially understood. It requires at least some element of risk of harm - as to which the decision-maker is entitled to make a judgment. In my view, the inspector's conclusion, while perhaps it should have been more precisely expressed, is to be understood in the context of her clear acceptance of the analysis in the Bat Report, which report concludes that mitigated lighting will ensure no significant disturbance by lighting. Her report suffices as representing the Board's conclusion on this specific issue and the Board's conclusion suffices.

EIA - Bats - Destruction of Bat Roosts

178. As stated, under a heading specific to "*lighting design*"[246] the Bat Report says that lighting design and management "*will ensure no aversive behaviour*" by bats and "*Therefore, the proposed*

246 §5.3 - Review of the proposed development's incorporation of bat mitigation into lighting design.

development is not anticipated to have any adverse impacts on the populations of these local bat species." This conclusion is explicitly limited to mitigation in lighting design and management.

179. There is no similar conclusion specific to the efficacy and result of mitigation of other effects on bats – and notably none as to destruction of roosts in breach of the Article 12(1)(d) prohibition on destruction of resting places of protected species. While it may have been arguable that the words "*To avoid such Impacts*"[247] in the introduction to that section of the Bat Report sufficed for that purpose, I think that a stretch too far. It is a description of RPS's purpose rather than of effect – in the particular context of, and in notable contrast with, the Bat Report's specific confirmation of the efficacy of mitigation in lighting design and management. In the end, I have concluded that, in its context, the phrase is too slender a reed to support a reading of the Bat Report as vouching that, with mitigation by provision of bat roosts, there will be no significant effect by reason of destruction of the necessarily presumed bat roosts in Stone Villa.

180. Thus interpreting the Bat Report, and given the requirement to apply the precautionary principle (found inter alia in the **Polish Case C-526/16**) – so that the risk of significant effect to the environment exists when it cannot be objectively excluded – it does not seem to me that there was an objective basis on the papers before the Inspector and the Board on which to conclude by way of Preliminary Examination that there was no real likelihood of significant effect by reason of destruction of bat roosts in Stone Villa. The Impugned Permission is defective in this regard and will be quashed on that account as, to adopt the wording of Shadowmill's plea, wrong in law and incompatible with the EIA Directive,[248] by reason of a failure to properly assess whether there is any real likelihood of significant impacts on bats entitled to strict protection.

181. My view is amplified by the importance attributed in the caselaw to resting places of protected species. The CJEU in the Polish case **C-441/17**, considered an impugned forest management regime which was "inevitably such as to result in the killing, and in the deterioration or destruction of breeding sites and resting places, of the species of saproxylic beetle" – species for which Article 12(1)(a) (killing) and Article 12(1)(d) (destruction of resting places) of the Habitats Directive prescribe strict protection. The CJEU declined to regard as decisive in Poland's favour the fact that the species were present on the site in question "in significant numbers" (in other words, that any losses would be insignificant). It held that Article 12(1)(d) of the Habitats Directive prescribes a regime of strict protection of the resting places of protected species "regardless of their numbers". It is clear from the context that the "numbers" in question are of the species rather than the resting places.

247 §5.1.
248 More accurately with its Irish transposition.

182. In similar vein, in **IE v Wein**[249] the CJEU held that "*strict protection must … make it possible actually to prevent effectively the deterioration or destruction of breeding sites or resting places"*[250] such that "'*resting places' ….. includes resting places no longer occupied by …the protected species ….. where there is a sufficiently high probability that that species will return to such places, which is a matter for the referring court to determine."*

183. This view is repeated in **Skydda Skogen**[251] which, when emphasising Article 12(1)(d) as demonstrating the "*intention to give breeding sites or resting places increased protection against acts causing their deterioration or destruction*", cited the Polish case to the effect that "*the strict protection laid down in Article 12(1)(d) of the Habitats Directive applies regardless of the number of specimens of the species concerned that are present in the area in question*". Protection of resting places is not dependent "*on the risk of an adverse effect on the conservation status of [the] species*" and "*strict protection must … make it possible actually to avoid harm to the protected animal species*"[252]

184. Bat roosts are clearly resting places for this purpose and bats are clearly protected from killing and bat roosts are clearly protected from destruction whether bats, or indeed their roosts, are scarce or plentiful – i.e. "*regardless of their numbers*".

EIA - Bats - the "wrong" Test

185. Shadowmill pleads that, whereas strictly protected species are protected as individual specimens, the Bat Report considered only whether the Proposed Development would affect the "*local populations*" of bat species and hence applied the wrong "test". It cites the **Polish Case C-441/17**[253] for protection by Article 12 of the Habitats Directive of individual specimens of protected species and **Namur Est**[254] for the proposition that any effect prohibited by Article 12 is, for EIA purposes, significant by its very nature. The Board's and Lilacstone's submissions oddly fail to engage on this point - save for the Board's profession to not understand Shadowmill's reliance on **Namur Est** and an unconvincing attempt to distinguish it.

186. Given the view I have taken above, I need not conclude a view on this issue. But some observations, obiter, may assist, assuming the matter is remitted to the Board, or, indeed, goes elsewhere. I have already addressed the issue in some degree above and concluded that, as to

249 IE v Magistrat der Stadt Wien. Case C-477/19, Judgment of 2 July 2020.; IE v Magistrat der Stadt Wien. Case C-357/20, Judgment of 28 October 2021.
250 Case C-477/19 - Citing to that effect, judgments of 9 June 2011, Commission v France, C-383/09, EU:C:2011:369, paragraphs 19 to 21, and of 10 October 2019, Luonnonsuojeluyhdistys Tapiola, C-674/17, EU:C:2019:851, paragraph 27,
251 Föreningen Skydda Skogen (C-473/19) §82 & 83 – as it happens a tree-felling case, though not concerned with bats.
252 §75 – as applied to the issue of Art 12(1)(d) resting places by reference in §85.
253 Commission v Poland Case C-441/17 31 May 2018 §236 & 237.
254 Case C-463/20 Namur-Est Environnement ASBL v Région Wallonne & Cimenteries CBR SA (AG Opinion 21 October 2021 §47) (Judgment 24 February 2022).

disturbance, framing the test in terms of effect on "local populations" of the species concerned is acceptable.

187. The Bat Report concludes that, assuming strict implementation of the lighting mitigation described, "*the proposed development is not anticipated to have any adverse impacts on the populations of these local bat species."* It will be recalled that the lighting issue relates to, specifically, disturbance of bats. Specifically as to disturbance by lighting, the Bat Report sufficed to support the conclusion by the Inspector and the Board, and that conclusion sufficed for a finding of no likely significant effect in that specific regard. The Inspector's use of the phrase "*minimise disturbance*" does not upset that view.

188. On any remittal, the Board will have to consider the question of significant effect by way of destruction of bat roosts in accordance with the caselaw cited above.

GROUND 3 – VALIDITY OF CONDITION 2 & JURISDICTION TO PERMIT A MODIFIED DEVELOPMENT

189. Shadowmill's core complaint in Ground 3 is of want of jurisdiction to impose Condition 2 of the Impugned Permission. Allegedly, Condition 2 did two things ultra vires:

- It excised Block B.
- It required that the area which had been for Block B be landscaped to a scheme to be agreed with the planning authority. It did so as to the curtilage of a protected structure - in which landscaping is not exempted development.

Statutory Provisions

190. The Board is empowered by S.37(1)(b) PDA 2000 to decide planning appeals as if the planning application had been made to it in the first instance. As to such decisions, S.34(1)-(4) PDA 2000 applies, subject to any necessary modifications, as it applies to the determination of a planning application by a planning authority. So, ceteris paribus, the powers of the Board in deciding appeals are those created by S.34. S.34(1) provides that

> *"Where -*
> *(a) an application is made to a planning authority in accordance with permission regulations for permission for the development of land, and*
> *(b) all requirements of the regulations are complied with*
> *the authority may decide to grant the permission subject to or without conditions, or to refuse it."*

As here relevant, S.34(1) re-enacted S.26 of the 1963 Act.[255]

191. In some contrast, S.9.(4)(d) of the 2016 Act[256] as to SHDs,[257] explicitly allows the Board to *"… grant permission, in part only, for the proposed development …"*. Shadowmill cites other provisions in similar form, which I will address below.

3.1 - Omission of Block B - Pleadings & Arguments

192. Shadowmill don't quite get to grips in their pleadings with the odd tautology of the Impugned Decision in both refusing permission for Block B and also imposing Condition 2 requiring its omission. The pleadings impugn Condition 2 only. However, the substantive intent of the pleadings is clear and, whether by part-refusal or by Condition 2, the effect of the Impugned Decision as to Block B is clear. It would be unfair to disadvantage Shadowmill by reference to the pleadings in this regard and I will not do so.

193. Shadowmill pleads "*two points*"[258] – directed respectively to the two matters Condition 2 addresses. §20 of the Grounds, in substance, addresses the omission of Block B, whereas §§21 and 22 address the alleged failure of the Board to adequately determine what landscaping is permitted in the area left vacant by the omission of Block B (which area I will, for convenience if perhaps somewhat inaccurately, call the "Void").

194. It is common case that S.34(1) does not explicitly empower the Board, as Shadowmill puts it, to grant part of an application, half of an application or permission for a development for which no application for permission was made and in respect of which no public participation has occurred for the purposes of either PDA 2000 or the EIA Directive.

195. Shadowmill submits that its point is "simple". It is that S.34 allows the Board only 3 options: grant as sought; grant with conditions; or refuse. It says, *"the Board simply has no jurisdiction pursuant to s.34(1) to grant permission in part only… ".* Had the Oireachtas intended to give the Board such a power it would have explicitly done so, as it did in every other example in the PDA 2000.[259] §20 of the Grounds, as to the omission of Block B, recites the absence in S.34 PDA 2000 of any express statutory power to permit part only of a planning application,[260] half an application or a

255 Local Government (Planning and Development) Act, 1963.
256 Planning and Development (Housing) and Residential Tenancies Act 2016.
257 Strategic Housing Development.
258 Grounds §19 to 22.
259 Under each of which the Board has 5 options – grant as sought, grant with conditions, grant with modifications, grant in part only, or refuse.
260 By which is clearly meant, part only of the development for which permission is sought in an application.

development for which no application was made and in respect of which no public participation has occurred for planning or EIA purposes. Shadowmill relies, inter alia, on the "conspicuous" absence from S.34(1) of any wording cognate with other statutory provisions which expressly provide for such permissions - such as S.9.(4)(d) of the 2016 Act which explicitly allows the Board to grant SHD[261] permission "*in part only*". It says that conspicuous absence, especially when the legislature might so easily have made in S.34(1) the same "part only" provision as it made in other provisions of the PDA 2000, must be taken as deliberate. It makes a similar observation as to the absence of such an express power in the list of potential planning conditions set out in S.34(4) PDA 2000. The plea is baldly of a simple want of jurisdiction in a creature of statute – citing **Murphy v Cobh**.[262]

196. §20 of the Grounds invokes lack of public participation – but for the specific purpose of illustrating the want of jurisdiction and that none should be inferred - as to do so would be unfair for want of public participation. Want of public participation is not invoked by way of an alternative plea that, if such a jurisdiction existed to permit part only of an application, its exercise in this case was vitiated by unfairness or want of public participation. There is no alternative plea, for example, that if the Board had jurisdiction to exclude Block B, fairness demanded that it invite,

- Lilacstone to submit revised plans or drawings providing for the omission of Block B[263] (Perhaps because **Abenglen**[264] is authority that the Board can permit a modified development without first inviting revised plans from the applicant for permission.),
- further submissions from stakeholders such as Shadowmill as to the prospect of a permission omitting Block B.[265]

197. Such an alternative case would have been a quite different case to that pleaded – which, as I say, baldly denied jurisdiction to permit part only of the Proposed Development. Yet, in the end, that different case was more or less the case argued and the Board objected accordingly.

198. Further, there is no alternative plea that the omission of Block B so radically or fundamentally changed the development permitted from that for which permission was sought that the omission exceeded the scope of a jurisdiction to amend or omit. It should be said that such arguments have not fared well in the past. I will address **Abenglen** and **Dietacaron** in this regard in due course.

261 Strategic Housing Development.
262 Murphy v Cobh Town Council [2006] IEHC 324 McMenamin J (§58): "In order for the Board properly to conduct its affairs there must be strict compliance with statutory procedure provisions. The Board is not entitled, as a creature of statue, to operate outside the four corners of the legislation which governs its powers. "
263 Under S.142(2) PDA 2000 and Article 73 PDR 2001.
264 State (Abenglen Properties) v Corporation of Dublin [1984] I.R. 381. Henchy J said that even if the planning condition imposed "went beyond modification (i.e., moderation or reduction of the scope of the permission applied for) and amounted to a radical variation ……. there was not, as counsel for Abenglen contended, a violation of article 27 of the Regulations of 1977. Article 27 provides that a planning authority, when it is disposed to grant a permission subject to a modification, may (not must) invite the applicant to submit revised plans or other drawings or other particulars providing for the modification. Article 27 is enabling and not mandatory."
265 Under S.131 PDA 2000.

199. The Board and Lilacstone say a power to grant permission of part of the development sought is implicit in S.34(1) and has been exercised since the 1963 Act[266] created the modern land use planning system. The Board argues that:

- Condition 2, in its making an admittedly radical amendment to the proposed development, is valid as within the general powers identified by in **Abenglen**, **Ashbourne** and **Weston**.[267] It observes that Shadowmill did not contend, much less do so seriously, that omission of Block B and landscaping that area was other than in accordance with the criterion that conditions be informed by considerations of proper planning and sustainable development.

- The Oireachtas, in enacting s.34(1) PDA 2000 in the same terms as S.26 of the 1963 Act was to be taken, on the "*Barras principle*", to have intended to replicate the established interpretation of S.26 as including an implied power to grant permission for part only of a development for which a planning application had been made.

- The rationale of **South-West Regional Shopping Centre**[268] applies as the practices both of permitting part only of a development for which permission had been sought and of permitting a modified version of a development for which permission had been sought had been endemic for many years before both the enactment of the PDA 2000 and the later amendments of the PDA providing for such approvals in the circumstances envisaged in the various sections other than S.34.

- The very fact that the scheme of the PDA 2000 allows for additional public consultation is reassuring as to the existence of a jurisdiction under S.34 to permit part only of a proposed development.

200. In the end, Shadowmill did not strongly resist the proposition that the planning system in general has at least and long-since assumed a power to grant permission under S.34 *"in part only"* and operated on that assumption in granting planning permissions. Its simple case is that that assumption and practice have been wrong as contrary to law.

3.1 - Omission of Block B – Fairness Case Not Pleaded

201. It seems to me useful to contrast a little further the case pleaded with that not pleaded - remembering that Shadowmill would have had to meet the "*absolute necessity for a precise defining of the grounds on which relief is sought*" - **AP v DPP**.[269] As observed, Shadowmill asserts a want of jurisdiction to permit a development different from that for which Lilacstone applied. Want of public participation as to the development permitted is invoked – but as a demonstration of the want of

266 Local Government (Planning and Development) Act, 1963.
267 All considered below.
268 See below.
269 [2011] 1 I.R. 729 – per Hardiman J §43 – recently cited in Foley v Environmental Protection Agency [2022] IEHC 470 (High Court (General), Twomey J, 26 July 2022).

jurisdiction rather than as a fair procedures ground in itself. This becomes further apparent when one considers what would have been required to plead and mount a fair procedures challenge.

202. First, Shadowmill would have had to face up to considerations which combine to tend to demonstrate the very jurisdiction which they deny in the case they do plead. **S.142 PDA 2000** and **Art. 73 PDR 2001** empower the Board[270]

- to invite an applicant for permission and enable an applicant so invited to submit revised plans, drawings or particulars modifying the proposed development.
- the Board to permit the development as so modified by all or any of the plans, drawings or particulars.

Notably, S.142 and Art. 73 essentially repeated **S.20** of the **1976 Act**[271] and **Article 42** of the **1977 Regulations**.[272] These powers existed before all of the cases cited on this issue in this judgment were decided.

203. **S.131 PDA 2000** gives the Board a very wide power, where it is of the opinion that, in the particular circumstances of an appeal, it is appropriate in the interests of justice to request, inter alia, any person who has made submissions or observations to the Board in the appeal, to make submissions or observations as to any matter which has arisen in relation to the appeal. **S.132 PDA 2000** empowers the Board to require of any party, or any person who has made submissions or observations to the Board any document, particulars or other information, which the Board considers may be necessary for the purpose of enabling it to determine an appeal. The Board also has power to hold an oral hearing,[273] at which any such revised plans could be considered and submissions made thereon by all interested parties. Indeed, if needs be and depending on the timing of the submission of such revised plans, the Board could, if fair procedures required that objectors be heard as to the revised plans, re-open an oral hearing held earlier.[274]

204. In short, the Board has explicit power to invite revised plans modifying a proposed development. No case was pleaded (nor, pleadings aside, was the case argued) that the Board failed to exercise its power to seek revised plans or that the Board's power to grant permission was limited by **S.142 PDA 2000**. None of the foregoing statutory provisions are called in aid in the pleaded grounds in this case. Further, whether or not it seeks revised plans, the Board has ample powers to ensure fair procedures where considering that it may permit a development other than that for which application was made. A fair procedures challenge would have had to be grounded in a failure to exercise those powers.

205. To mount a case in fair procedures, Shadowmill would have had to show that it was prejudiced by the allegedly unfair procedures. It would have had to specify what it would have said in

270 Article 34 PDR 2001 gives a similar power to the planning authority.
271 Local Government (Planning and Development) Act, 1976. It established the Board.
272 Local Government (Planning and Development) Regulations, 1977.
273 S.134 PDA 2000.
274 Art. 77 PDR 2000.

objection to the development permitted but was unable to say due to the procedure adopted. Certainly, the courts are cautious in finding an absence of prejudice where procedures are unfair – Shadowmill cites **Holborn Studios**[275] and it was followed by **Suliman**.[276] But **Holborn Studios** was an explicitly fair procedures challenge in which the successful applicants for certiorari had adduced evidence, given weight by the judge, of matters on which they could have made representations in respect of the permitted development as it differed from that for which the planning application had been made and were prejudiced in consequence as it could have made a difference to the decision. While this is by no means a case which does not elucidate principles, the ultimate question decided was whether on the facts of the case, which was not limited to omission of part of the proposed development, *"there was nothing that Mr Brenner, and others who might have supported him, could have said that could have had any effect on the decision of the planning subcommittee had they been given the opportunity".*

206. In **Wexele**,[277] the applicant in judicial review complained, on fair procedures grounds, of failure to circulate a third-party observation such that it was shut out of responding to it. Charleton J refused certiorari for the applicant's failure to show that it had had something to say to the impugned decision-maker which had not otherwise been said. He cited **Haverty**[278] to the effect that:

> *"The essence of natural justice is that it requires the application of broad principles of commonsense and fair play to a given set of circumstances in which a person is acting judicially. What will be required must vary with the circumstances of the case …"*

Charleton J cited **Evans**[279] as *"focussed on the nature of the submission that might have been made and the effect that it could reasonably be argued to have had on the appeal."* Fundamentally, such a complainant had to reveal what substantive, as opposed to theoretical, fairness had been denied to it. It must identify what it had to say - and then discharge the burden of showing that it had been unjust for the Board to cut them out of saying it. Of the S.131 power to seek further submissions or observations, and while not diluting the express statutory criterion of the interests of justice[280] Charleton J said that *"The first principal applicable is that of utility".*[281]

207. **Frank Harrington**,[282] cited to me, is analogous. The Applicant, who sought certiorari of the refusal of retention planning permission for crushing, screening and washing plant and two ESB substations in its quarry, alleged a duty on the Board to have circulated to it for response information received by it from others[283] as to the alleged unauthorised planning status of the quarry. Hedigan J considered that:

275 R (Holborn Studios Ltd) v Council of the London Borough of Hackney; [2017] All ER (D) 121 (Nov) [2017] EWHC 2823 (Admin) Queen's Bench Division (Planning Court) John Howell QC (sitting as a Deputy High Court Judge) 10 November 2017.
276 R (Suliman) v Bournemouth, Christchurch and Poole Council [2022] EWHC 1196 (Admin).
277 Wexele v An Bord Pleanála [2010] IEHC 21, §20.
278 State (Haverty) v. An Bord Pleanála, [1987] I.R. 485.
279 Evans v An Bord Pleanála, High Court, Unreported 7th November, 2003, Kearns J - a case decided under s.7 of the Local Government (Planning and Development) Act 1992 - the equivalent of s. 131 PDA 2000.
280 See e.g. §31.
281 §19.
282 Frank Harrington Ltd v Bord Pleanála [2010] IEHC 428.
283 Including An Taisce and Mayo County Council.

"to sustain this complaint the applicant should clearly demonstrate to the court what response he would have made and that these responses might well have changed the decision that was made. The applicant has not done so and therefore this objection is somewhat unreal and therefore unsustainable."

"The applicant complains that the Board should have circulated the responses provided to the s. 137 notice but has not demonstrated to the court what response it would have made and that these responses might well have changed the decision that was made."

208. Though emphasising that no fair procedures case is pleaded, Lilacstone cites **Simons**,[284] in turn citing Wexele, to the effect that:

"Fundamentally, if a complaint is made that an applicant was shut out of making a submission, that party must show that they have something to say. What they have to say must not be something that has already been said. …. they must reveal what has been denied to them, what they have to say and [show] *… that it had been unjust for the Board to cut them off from saying it."*

209. It is difficult to see what of possible significant consequence Shadowmill might have said in objection to the Permitted Development (omitting Block B) which it had not said (or had had the chance to say) as to the Proposed Development. It is difficult to see that Shadowmill could have said that the omission of Block B exacerbated the concerns it had expressed or generated substantial new ones. However, even if I am wrong in that observation, I need not speculate as to what Shadowmill could or might have said to the Board as to the omission of Block B. Shadowmill has not identified what it would have said. It proffers no evidence along those lines. Absent evidence (a significant absence), the furthest it was put by Shadowmill in argument by counsel was that "……. *it would seem to come down to the opportunity to say … omitting Block B does not fix the problems associated with Block A, and …… no one had any opportunity to say anything about landscaping (the void left by omitting Block B) and how that should be carried out."*[285] But Shadowmill had made its submissions on what it saw as the problems associated with Block A. The Board clearly considered Block A acceptable despite Shadowmill's submissions and no-one suggested that omitting Block B addressed any such problems. As to landscaping, had unfairness been pleaded, I would have regarded any unfairness as not "*so unfair as to be unlawful*".[286]

210. Nor, for that matter, has Shadowmill identified even generally, what others might have said – an issue arguably relevant were **Holborn Studios** to be applied in this jurisdiction. Given how obvious the question in that regard was, one can only infer that Shadowmill considered that it would have had difficulty answering the question convincingly and therefore preferred to stand on the alleged

284 Simons on Planning Law, 3rd Ed'n (Browne) §6-135 et seq.
285 Day 1 p101.
286 See below as to Holborn and other cases establishing the test of unfairness.

absence of jurisdiction - citing fair procedures as a buttress to that argument rather than as a ground of challenge in itself. But, ultimately, the very availability of those fair procedures, via the statutory procedures I have described, undermines the jurisdictional point.

211. Counsel for the Board accurately stated that "…. *the case that I am meeting is, is there a power to impose a condition allowing an amendment or omission? Not the different case, which was that there is such a power, but this decision exceeds the limits of that power."*[287]

3.1 - Omission of Block B - Discussion - Split Decisions/Conditions for Omissions from 1963

212. Turning to the case Shadowmill did make and given the arguments, it is of some relevance to put the caselaw and statutes in roughly chronological order.

213. All agree that since the 1963 Act - S.26 of which was, as here relevant, re-enacted in S.34(1) PDA 2000[288] - it has been entirely commonplace that applicants for planning permissions often do not, where they get permissions, get exactly what they asked for. This effect is produced in varying ways and degrees. As here relevant, it may take the form of a condition. Or it may take the form of what has come to be called a "*split decision*" - a combination of part-grant and part-refusal of the application. In practice neither is in any way unusual, and both occurred in this case – though each to the same effect and perhaps tautologously.

214. It is a commonplace that wind farms are permitted with fewer turbines than sought, that permissions excise floors from buildings for which permission is sought (as here) (for example to reduce their height and massing) and that fewer houses are permitted in estates than sought. Such things are often done without any requirement for revised proposals or drawings. The decision of the planning authority or the Board simply issues requiring the relevant omission. There can be little doubt that, subject to considerations of fairness to participants in the planning system, such flexibility is highly desirable and greatly assists the efficient fashioning of planning decisions consistent with proper planning and sustainable development.[289] Indeed, it is easy to see that the absence of such a power would constitute a considerable bureaucratic impediment to desirable development and the attainment of purposes of proper planning and sustainable development.

215. In this context the Board's reliance on **Pembroke Road**[290] is well-conceived to the effect that

287 Day 2 p99.
288 See above.
289 This is a general and systemic observation – of course many such individual decisions will disappoint particular participants in the planning system.
290 Pembroke Road Association & Waltham Abbey Residents Association v An Bord Pleanála [2022] IESC 30 §43.

> *"……. statutory provisions should be read, where possible, so as to produce a workable and coherent interpretation, thereby avoiding interpretations which were either incongruous or which imposed unfair or anomalous obligations on private citizens in particular. ….. the Planning Acts should, where possible, not be interpreted in a way which would lead to "strange incongruities.""*

216. From a practical point of view of advancing proper planning and sustainable development, of avoidance of delay of otherwise desirable development and of delay to other stakeholders (for example local residents) in knowing where they stand as to a proposed development, and as to the efficient use of many types of resource, there can be no doubt that this practice of making split decisions and/or imposing such conditions is, ceteris paribus, beneficial. In my view, it is no exaggeration to regard such practices as necessary to the workability of the Planning Code. While their practical advantages are not necessarily determinative of the legality of such practices, as will be seen, their existence over time is relevant to that legality and to a proper interpretation of the statutory scheme. It is fair to say that Shadowmill's challenge in this case, as pleaded, is a frontal attack on those practices. Its counsel acknowledged the practice but asserted that the problem was the absence of principle underlying the practice.[291]

217. That said, and by way of a general observation and as a matter of good public administration, the liberal exercise of the power to require revised plans and particulars, involving little delay in the great scheme of things, at least as compared with time languishing in judicial review, has much to commend it. It tends to the presence on the planning file of drawings depicting the development actually permitted – absent in the present case – and the exercise of their preparation may draw attention to unintended consequences of omissions and the like. Had that been done in this case the file would include drawings depicting the development actually permitted (there is no drawing showing the development without Block B). It would inevitably have prompted a drawing filling with landscaping proposals the Void left by omitting Block B – which proposals, indeed, the Board could have requested. Such a process would undoubtedly have enured to the clarity and legibility of the Impugned Decision. However, a plea of failure in this regard is not made in this case against the Board. While I hope my remarks may assist as a matter of good public administration (as to which, I freely admit, there may be countervailing considerations of which I am unaware), I am not to be taken as here suggesting that such a plea would succeed in law if made and it is clear that the decision to exercise such powers is a matter of discretion in the decision-makers.

218. However, on the facts of this case, the Board makes the worthwhile point that the omission of Block B, far from being in breach of obligations of public participation, was demonstrably in response to and, indeed by way of acceptance and vindication of, the concerns expressed in public participation – notably as to overbearing intrusiveness injuring the residential amenities of adjacent residences. In its reasons for not accepting the Inspector's recommendation to refuse permission, the Board asserted that *"the omission of Block B would remove any unacceptable impacts on*

291 Day 1 p68.

surrounding property". As specifically relates to Block B,[292] no doubt has been cast on that assertion, even in argument.

219. In considering what here follows, it must be remembered that principles of statutory interpretation are not strict rules but rather are tools to aid discerning the true intent of the Oireachtas – "*the focus of all interpretive exercises is to find out what the legislature meant*".[293] In **Crilly v Farrington**[294] Murray J referred to the "*difficulties inherent in statutory construction*" and to canons, principles and presumptions of construction as

> *"efficient and neutral aids*[295] *to the interpretation of statutes and .. not some sort of standard formulae automatically shaping the result of an interpretative issue ….. The use of canons or principles of construction, or any one or combination of them in a given case depends on a variety of factors and their interplay - the complexity or clarity of the text in issue, whether applicable precedents exist, whether there are fundamental principles in issue or constitutional considerations - one could go on. The point of departure for the court is always the actual text of the statute to be interpreted and it is a matter of judicial appreciation, in the light of submissions from counsel, which canons or method of interpretation are appropriate to the nature of the problem which presents itself in the particular case."*

220. Indeed, it has been authoritatively said by the Supreme Court that "*It can be very difficult to try and identify a common thread which can both coherently and intelligibly explain why, in any given case one particular rule rather than another has been applied, and why in a similar case the opposite has also occurred."* [296]

221. I now turn to a more-or-less chronological account of the relevant caselaw.

Fortunestown, 1977 & Kent County Council, 1976 & Academic Commentary

222. The Board and Lilacstone note that in **Fortunestown**,[297] Finlay P, as cited by **Nowlan,**[298] held that the words in S.26(1) "*may decide to grant the permission ……..or refuse it*" may be interpreted as "*may decide to grant …… and refuse it*" and "*Hence a decision to grant proper permission for one part and outline permission for the remainder of a large residential development was a proper decision."* This is one of only two records of this oral ex tempore judgment.

292 No doubt residents still object to Block A for such reasons.
293 Dunnes Stores v. The Revenue Commissioners [2019] IESC 50; Bookfinders Ltd v. Revenue Commissioners [2020] IESC 60 (Supreme Court, O'Donnell J, 29 September 2020).
294 Crilly v. T. & J. Farrington Ltd. [2001] 3 IR 251 @ 287.
295 Emphasis in original.
296 Dunnes Stores v. The Revenue Commissioners [2019] IESC 50; Bookfinders Ltd v. Revenue Commissioners [2020] IESC 60 (Supreme Court, O'Donnell J, 29 September 2020).
297 Fortunestown Holdings Ltd v Dublin City Council High Court Finlay P 16 November 1977 (oral judgement).
298 A Guide to Planning Legislation in the Republic of Ireland, Incorporated Law Society 1988.

223. The question arises whether this account of Fortunestown, published in 1988, should be considered, on the "*Barras Principle*",[299] to have informed the drafting of the PDA 2000. The Board fairly concedes that this is a somewhat scant record of an oral judgment on which it would be incorrect to place excessive weight. Counsel for Lilacstone, equally fairly, drew my attention to the limitations on the Barras Principle, described in **Dodd**[300] and in **Fahy**,[301] to the effect that it applies in the case of "*a clear judicial interpretation*" of a statute and not in the case of unreported decisions. I accept that as the law. And Bennion[302] says in any event that the Barras principle is "*not a rigid rule*". – it is *"at most a presumption the strength of which will vary according to the context: … The question in the end is always whether the legislature intended the term to be given the meaning it has been given previously"* - a passage approved by the Supreme Court in **MAK.**[303]

224. However, Nowlan was published by the Incorporated Law Society at a time when Irish legal texts were far fewer and further between than their present proliferation. Professor Nowlan's eminence in planning and planning law is amply recorded in the Dictionary of Irish Biography.[304] From a lengthy entry, it suffices here to record that he was a special advisor to the Government on the formulation of the 1963 Act and was a founder of the planning department, and the first occupant of the chair of planning, in UCD. It is readily to be inferred that, while not a formal report, Prof. Nowlan's account of Fortunestown is a report of sorts nonetheless and that it would have been well-known to the legal profession practising planning law and to those drafting the PDA 2000. It would have been regarded by them as authoritative in expressing, however briefly, the essence of that decision and considered reflective also of general planning practice and understanding of the law in the years since the 1963 Act was passed. Remembering that canons of construction are not strict rules but aids to discerning the intention of the legislature, it seems to me that, whether or not one regards it as an application of the Barras Principle, Prof. Nowlan's account of Fortunestown reliably assists in interpreting the significance of the re-enactment in S.34(1) PDA 2000 of S.26(1) of the 1963 Act as relevant.

225. All the same points can be made, with at very least equal force, of the other citation of **Fortunestown** - by **Keane**[305] in 1982 - for the proposition that**:**

> *"The planning authority is not, however, limited to either granting the permission or refusing it. It may grant the permission in respect of part only of the development and refuse it in respect of the balance"*

299 "That Parliament may, and in a proper cause should, be presumed to have known and adopted a clear decision, even of a Court of first instance, upon the interpretation of a statute, when the same word or phrase is subsequently used in a statute in pari materia, and a fortiori in a consolidating Statute". - AG(Fahy) v Bruen #2 1937 IR 125.
300 On Statutory Interpretation §8.48 et seq.
301 AG (Fahy) v Bruen #2 1937 IR 125.
302 Bennion, Bailey and Norbury on Statutory Interpretation/Part 7 External Aids to Construction/Chapter 24 External Aids to Construction/Earlier law as aid to construction/Section 24.6: Judicial interpretation of earlier legislation ('Barras principle').
303 MAK v The Minister for Justice and Equality [2019] 1 IR 217.
304 Nowlan, Kevin Ingram | Dictionary of Irish Biography (dib.ie).
305 The Law of Local Government in the Republic of Ireland, Incorporated Law Society 1982 p176. The author was then Keane J of the High Court and eminent in planning law. He was later Chief Justice.

Keane cited Finlay P in **Fortunestown** as holding that:

> *"any other construction of section 26 would indeed be unfair to applicants for permission, since it would oblige the planning authority to refuse applications for permission in cases of very extensive development where a partial permission would clearly be justified"*

226. Though I cannot infer that it was cited to or by Finlay P in **Fortunestown**, his judgment also derives ballast from the unlikely coincidence that, less than a year earlier, the Queen's Bench had taken essentially the same view as that attributed by Nowlan to Finlay P. In a case involving **Kent County Council**[306] - a case cited in **Granada Hospitality**[307] for the view that *"… it is lawful for the decision maker to decide of his own motion to grant a lesser permission"* - permission had been granted for part only of an application for permission for an oil refinery. As the Board has done in the present case, the impugned decision not only expressly refused permission for part of the oil refinery development but also imposed a condition to the same substantive effect.

227. S.29 of the Town and Country Planning Act 1971 was notably similar to S.26 of the 1963 Act and S.34 PDA 2000, in that it empowered the decision-maker in a planning application to *"grant planning permission, either unconditionally or subject to such conditions as they think fit; or (to) … refuse planning permission".* Kent argued that S.29 allowed a grant, conditional or unconditional or a refusal of permission but not both. It argued that the word "or" in S.29 was disjunctive[308] — that is to say, that planning permission could not be both granted and refused on the same application. The argument failed.

228. It seemed to the Queen's Bench that "*as a matter of common sense, the determining authority can grant as much of the development applied for as they think should be permitted*" and it was "*common practice for applications to be dealt with in this way—for example, where permission for 50 houses is applied for and the local planning authority grants permission for 40*." Nor did it matter whether the decision was on an amended application or was a part refusal, "*save that in the latter case it is necessary to construe the word "or" conjunctively. I think, however, that that may be done having regard to the context of the part of the Act in which the word appears*[309] *….. Part III of the Act of 1971*[310] *does require "or" to be read as "and," …".*

229. The Kent case turned on an analysis of S.29 in the scheme of Part III of the Act of 1971. I have not attempted a full analysis of that Act or compared it with our 1963 Act. Nonetheless, as between

306 Kent County Council v Secretary of State for the Environment and Another (1977) 33 P. & C.R. 70.
307 See below.
308 Citing R. v Federal Steam Navigation Co. Ltd. [1974] 1 W.L.R. 505 ; [1974] 2 All E.R. 97, H.L.(E.).
309 Citing Mersey Docks and Harbour Board v Henderson Brothers 13 App. Cas. 595 in which Lord Halsbury L.C. said "… I know of no authority for such a proceeding unless the context makes the necessary meaning of "or" "and," as in some instances it does; but I believe it is wholly unexampled so to read it when doing so will upon one construction entirely alter the meaning of the sentence, unless some other part of the same statute or the clear intention of it requires that to be done, …"
310 The report reads "1961" but that is clearly a typographical error.

Fortunestown and the Kent case, the coincidence is remarkable of timing and of statutory interpretation of very similar sections, in statutes on the same subject-matter, to the effect that, in both sections, "or" means "and". I might add that, in statutory interpretation, attributing a conjunctive sense to "or" should not surprise – see MacMenamin J in **Bederev**.[311]

230. I do not purport to depart from **Fahy** as to the limits of the Barras Principle. As I have said, canons of construction are not strict rules but are aids to discerning the intention of the legislature. Rather I consider this an unusual circumstance in which the information to hand accretes to consistent and reliable assistance in interpreting S.34(1). It does seem to me that, taken together, **Fortunestown, Nowlan, Keane** and **Kent County Council** are appreciable authority that a planning decision on foot of a jurisdiction in terms of S.26 of the 1963 Act and S.34(1) PDA 2000 can be a part-grant and part-refusal and they add considerable weight to the view apparent in **Abenglen**[312] that the courts have been willing to uphold planning permissions for developments significantly different to those for which permission has been sought and had been willing to do so in the interim between the 1963 Act and the PDA 2000. I consider accordingly that the Oireachtas should be assumed to have been aware of that position and intended its continuance when re-enacting S.26(1) of the 1963 Act as S.34(1) PDA 2000.

Wheatcroft, 1980 & Granada Hospitality, 2000

231. The law across the water lends appreciable support to the view I have just expressed. In **Wheatcroft**[313] outline planning permission was sought for about[314] 420 dwellings on 35 acres. At the inquiry[315] the developer proposed, as an alternative, about 250 dwellings on 25 acres. The local council and objectors objected to any development of the site. The Inspector reported that the proposal of 420 dwellings on 35 acres should be refused but that if it were legal to permit it, 250 dwellings on 25 acres would not be objectionable. The Secretary of State[316] refused permission on the basis that "*the proposed development is not severable and it would be improper to purport to grant permission in respect of part of the site or for a lesser number of houses*".

232. On the developer's application, Forbes J quashed that refusal on the basis that:

- No principle of law prevented planning conditions reducing the permitted development below that for which permission had been applied unless the application was severable;

311 Bederev v Ireland, et al [2016] 3 IR 1.
312 See below.
313 Bernard Wheatcroft Ltd v Secretary of State for The Environment (1982) 43 P & CR 233.
314 The imprecision being a function of a statutory scheme different to ours.
315 Which, for present purposes, can be thought of as analogous to an oral hearing in an appeal before the Board.
316 Analogous here to the Board.

- The true test was not whether the development proposed in the application was severable but whether the planning permission would allow development in substance not that for which permission had been applied.

- The planning decision-maker's decision whether there is a substantial difference is an exercise of judgment with which the courts will not ordinarily interfere save for irrationality.[317]

233. Forbes J considered, per curiam, that:

- The main, though not the only criterion whether there is a substantial difference, was "*whether the development is so changed … that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation."*

- *"Where a proposed development has been the subject of such consultation and has produced a root-and-branch opposition to any development at all, it is difficult to believe that it should be necessary to go again through the process of consultation about a smaller development."*

- *"It is clear that, in this case, the processes of consultation had resulted in such root-and-branch opposition that further consultation could not have resulted in more opposition but only, if there was any change in public attitudes, in less."*

- *"I have come to my general conclusion with a certain feeling of satisfaction, as it seems to me to permit a welcome degree of flexibility in the conduct of planning applications and appeals while at the same time maintaining adequate safeguards for the interests of those in whose favour the provisions for consultation were enacted."*

- *"Why should it be impossible for the local planning authority to say, on an application for outline planning permission: "we think 35 acres is too much but 25 will be all right," and similarly with a reduction in density? So long as the reduction passes the test of not altering the substance of the application, what vice is there in that?"*

234. So while at first blush, in asking whether the planning permission would allow development in substance not that for which permission had been applied, Wheatcroft might be thought to favour Shadowmill in the present case, on further examination it very much favours the Board and in its rationale prefigures to some degree, the rationale of Charleton J in **Wexele**.

235. Wheatcroft does not seem to have been considered in any Irish cases, but it was considered in **British Telecommunications v Gloucester**[318] which was in turn considered in **Dietacaron**, to which I will come in due course.

317 Forbes J used the phrase "manifestly unreasonably exercised".
318 British Telecommunications Plc & Anor v Gloucester City Council [2001] EWHC Admin 1001.

236. I will consider **Granada Hospitality**[319] out of chronological order as it helpfully elucidates the practical application of Wheatcroft. Granada Hospitality was a case of refusal of permission to extend a motorway service area Travelodge by two separate extensions - an extra 4 bedrooms at the eastern end and at the western end an extra 30 bedrooms. The refusal was impugned, inter alia, on the basis that, even though the planning applicant had not asked him to, the Secretary of State should have considered permitting the eastern extension only. Collins J cited Wheatcroft to the effect that *"there is no question but that the Secretary of State would have been entitled to have considered whether he might grant the lesser of the extensions at the eastern MSA."* Collins J then cited Forbes J's criterion of deprivation of the opportunity of consultation and considered that,

- *"Those who might otherwise have objected to a proposal must not have their rights overridden by the grant of a permission which is different from that which is applied for, in the sense that it raises issues to which they might have wanted to object had they known of the proposal in question."*

- *"… it is lawful for the decision maker to decide of his own motion to grant a lesser permission.*[320] *…… but care must be taken if that course is considered appropriate. It would normally be right, if such a course was proposed, to notify the applicant and to inquire whether the applicant wished to make any representations in relation to such a decision. In addition, it is essential that the decision maker comply with what can be described as the Wheatcroft reservations, i.e. that he must not do so if there is any possible prejudice to those who might otherwise have raised objections. But with those safeguards, such a course is, in my judgment, undoubtedly lawful."*

- *"On the facts of this case, it is difficult to see that there could have been any such objection because the Council was objecting to the whole development, …… overall, it seems to me that there is no conceivable reason why the lesser extension should not have been granted without the need for any further representations to be required or made. No-one would have been prejudiced by such a decision."*

I should say that the foregoing is obiter as Collins J considered that, at least where the planning applicant had not raised the issue, the Secretary of State was entitled but not obliged to consider granting a lesser permission. However, the obiter seems to me a good one.

237. By reference to the views of Forbes J in Wheatcroft, and the view taken of its practical application in Granada Hospitality, I pause to observe that while Shadowmill expressed itself[321] not opposed in principle to residential development on the Site, its objection to Lilacstone's appeal can fairly be described as "*root and branch*". Shadowmill has not, in these proceedings, articulated how or in what respects it was deprived of its rights of consultation, as it relates to the Permitted Development, in any substantive practical sense. Clearly, it has not been deprived of opportunity to

319 Granada Hospitality Limited v Secretary of State for the Environment, Transport and the Regions and Another (2001) 81 P. & C.R. 36.
320 Citing Kent County Council v Secretary of State for the Environment [1976] 33 P. & C.R. 70.
321 Per Future Analytics.

object as to allegedly objectionable characteristics and effects of what will be developed – essentially Stone Villa and Block A. Not least, as Block A would have separated Stone Villa from Block B, it is difficult to see that the omission of Block B could exacerbate any effect on Stone Villa as a protected structure. It is equally difficult to see that its omission could exacerbate any other objectionable characteristics and effects of the development of Stone Villa and Block A. The omission of Block B inevitably diminishes, to whatever greater or lesser degree, the weight of the main thrust of the Future Analytics allegations of excessive and overbearing scale, disproportion, height, density, massing and bulk, proximity to boundaries, over-looking and site coverage and resultant adverse impact on the residential amenity, including privacy, of local residents. I cannot see how the omission of Block B could exacerbate any such effects. Or, at least, I cannot see it in the absence of evidence from Shadowmill explaining how the omission of Block B could exacerbate any such effects. In so observing I assume, without so holding, that Shadowmill might for that purpose have pointed to prejudice to local residents – that is, persons other than itself. All that being so, I cannot see that in substance Shadowmill has been, in any real way, deprived of any opportunity of public consultation. As I have observed, it may well be that that is why Shadowmill did not mount a fair procedures challenge to the Impugned Permission.

Abenglen, 1982

238. In **Abenglen**,[322] cited by the Board and Lilacstone, permission was sought for a 48,000 ft^2 of offices and 12,000 ft^2 of residential accommodation but was granted for only 16,000 ft^2 of offices and for 24,000 ft^2 of residential accommodation.[323] Condition 2 required the reduction of the central office block from 5 to 3 storeys and the doubling of the width and floor area of 2 residential blocks. Abenglen argued that the permission was for a development so radically different to that for which it had applied that the Council had failed in their obligation to determine the planning application actually made. While Abenglen lost on other bases also, Henchy, Griffin and Hederman JJ rejected that argument.[324] Henchy J said in upholding Condition 2:

> *"I do not accede to the submission that the permission granted is so different from that applied far that it does not amount to an adjudication of Abenglen's application. Unquestionably, the permission granted differed substantially from that applied for — particularly in terms of height of buildings, reduction of amount of office space, increase of the amount of residential space and variation of the ratio of office space to the total area to be built on. But, in my opinion, the variation was valid for it was effected by the imposition of conditions which the respondents were authorised by s.26 of the Act of 1963 to impose for permitted purposes.*
>
> *It is true that [Condition 2] refers to itself as amounting to "modifications of the outline plans submitted", but that condition was expressly imposed as a condition and the word "modifications" is merely a word that inaptly describes the result of the condition. The conditions*

322 State (Abenglen Properties) v Corporation of Dublin [1984] I.R. 381.
323 Counsel for the Board very fairly observes that this information does not appear in the judgments in Abenglen but in an introductory part of the report of the case in the Irish Reports. However, I consider that I may regard it as reliable.
324 Griffin and Hederman JJ agreeing with Henchy J on the point.

imposed were, as they were required by s.26 to be, the result of consideration of the proper planning and development of the area and having regard to the provisions of the development plan, but apart from the fact that they were expressly imposed as conditions, they went beyond modification (i.e., moderation or reduction of the scope of the permission applied for) and amounted to a radical variation."

239. Counsel for the Board and Lilacstone in different respects pointed out how radical, in their vires, were the changes upheld in Abenglen. For the Board it was said[325] that Abenglen got permission for 12,000 ft^2 of residential accommodation for which it had never sought permission. For Lilacstone it was pointed out[326] that the condition completely changed the balance of mix of uses – from office towards residential.

240. In my view that passage lends considerable support to the Board's and Lilacstone's case that Condition 2, as to omission of Block 2, was intra vires. It rejects the argument that that the permission was for a development so radically different to that for which Abenglen had applied that the Council had failed in their obligation to determine the planning application actually made by the prosecutors and explicitly upholds a condition that "*amounted to a radical variation".* This passage also seems to me to contradict the obiter of Walsh J in the same case, that the conditions imposed under the then-equivalent to s.34(1) should be of the same nature as those referred to in the then-equivalent to s.34(4).

241. Further, I accept Lilacstone's submission that, bracketed in point of time by s.26(1) of the 1963 Act and s.34(1) PDA 2000, Abenglen is a decision of the Supreme Court to which the Barras Principle can be applied.

Galligan, 1997 & cases cited therein

242. While much legal water has flown under the bridge since **Galligan**[327] was published in 1997, it was in its day, which was just prior to the enactment of the PDA 2000, a leading text on Irish planning law. Under the heading "*Conditions altering the nature of the development proposed*",[328] it recites the radical nature of the amendment of the development which had survived scrutiny in **Abenglen**. Mr Galligan considered that Henchy J had gone too far but that Walsh J was too restrictive. Mr Galligan recommended the via media he saw as provided by **Wheatcroft**. Mr Galligan considered, on the basis of **O'Keeffe**,[329] that the Board would have considerable latitude in deciding whether an

325 Day 2 p117.
326 Day 3 p93.
327 Irish Planning Law and Procedure, Round Hall Sweet and Maxwell 1997. I should record that Mr Galligan represented Lilacstone in these proceedings. He mentioned his text in suitably diffident terms.
328 §8.2.3.1.
329 O'Keeffe v An Bord Pleanála [1993] 1 IR 39.

amendment to the proposed development amounted to such a substantial alteration as to preclude a proper adjudication on the application.

243. Mr Galligan's book[330] cited **Wessex v Salisbury**[331] as a case in which a permission was granted reducing the development from 48 houses (as sought) to 37 on the same site and was upheld by Glidewell J as not unreasonable. I confess that, on reading Wessex, I understand it differently. It was a case in which the planning authority refused permission for 48 houses and, on appeal, the landowner proposed a reduction to 37, citing Wheatcroft. The Inspector[332] refused permission, as 48 houses was too many and *"in the circumstances of this case".* He considered that 37 "*differs substantially*" from the 48 proposed and would require a new planning application. Glidewell J held this to have been an adoption of the correct test as set in Wheatcroft and, emphasising his reluctance given the reduction to 37 had been fully discussed at the inquiry by the inspector,[333] concluded that the refusal of permission was not irrational on this account.[334] In **Breckland**[335] Wessex is described in accordance with my understanding of it. While Wessex, properly understood, does not assist the Board and Lilacstone, neither does it assist Shadowmill.

244. In **Breckland,** the Court set aside as irrational a permission for a "gypsy"[336] caravan site which increased the site area from 1 acre as originally sought, by 50% to 1.5 acres as sought on an amended plan. The increase was to accommodate 16 caravan pitches, for which 1 acre was too small - such that third parties might have wished to argue for a smaller number of pitches on the original site. By the site size increase, the site was brought significantly closer to three houses.

245. The Council successfully argued, inter alia, that on those facts, the amendment could only be regarded as substantial and should have been notified to the persons affected and the inspector's conclusion that it was not was irrational.[337] It was held, applying Wheatcroft, that an amendment enlarging the application site was not *ipso facto* invalid. It could be lawful. But it must be looked at with special care and the validity of an enlargement may be harder to justify than a reduction. In contrast, the earlier caselaw[338] had concerned reductions in the scope of development. Breckland was not grounded primarily in the issue of lack of consultation with the public – the court said: *"Where there is a clear case (as I think there is here) it is not, in my view, strictly necessary to consider whether there has been a failure to consult persons affected*." It does decide that some amendments

330 Pp 202 & 203.
331 Wessex Regional Health Authority v Salisbury District Council and another [1983] Lexis Citation 362 [1984] JPL 344.
332 Appointed by the Secretary of State – analogous here to the Board.
333 Analogous here to an oral hearing.
334 The Inspector seems to have thought that there could be persons who would have wanted to object to the 37-house layout but did not know about the inquiry, and so would be deprived of the opportunity. See also Moore, A Practical Approach To Planning Law, 8th Edition, Oxford, 2002 p319.
335 Breckland District Council v Secretary of State for the Environment and another - [1992] 3 PLR 89 – a decision of the Queen's Bench and the case next cited in Galligan.
336 The word used in the judgment.
337 I use the word irrational in the Irish law sense. The phrase used in the decision in Breckland is "perverse or unreasonable in the Wednesbury sense" in reference to Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; [1947] 2 All ER 680; (1947) 45 LGR 635; 63 TLR 623, CA.
338 Citing Kent County Council v Secretary of State for the Environment (1976) 33 P&CR 70, Bernard Wheatcroft Ltd v Secretary of State for the Environment (1980) 43 P&CR 233 and Wessex Regional Health Authority v Salisbury District Council [1984] JPL 344.

can be simply outwith the power to amend – at least where they increase as opposed to reduce the scope of the development (and that seems to me, at least in general terms, a significant factor). But Breckland recognises the jurisdiction to amend the development proposal and deems amendments reviewable only for irrationality: *"the making of an amendment to a planning application is an exercise of discretion and this court can only interfere with a decision if it fails to comply with the Wednesbury rules, which in the present case means if the result is perverse or unreasonable in the sense that no reasonable inspector properly directed could arrive at the decision."* In recognising the jurisdiction to amend, Breckland assists the Board in this case. And Shadowmill did not challenge the Impugned Permission for irrationality.

246. Of course, I remind myself as to the decisions cited in Galligan, and generally, that English decisions on planning law are to be treated cautiously here as made in a different statutory context. But, as cited in a leading Irish text published in 1997, the decisions cited in Galligan may be thought of as expressing the general understanding of the law as it stood shortly before the re-enactment by S.34(1) PDA 2000 of S.26 of the 1963 Act regarding the scope to permit a development in a scope amended as compared to the planning application. And, as I say, the relevant English statutory provision[339] considered in the **Kent** case and in **Wheatcroft** was similar to S.26 of the 1963 Act and S.34 PDA 2000 in that it empowered the decision-maker on a planning application to *"grant planning permission, either unconditionally or subject to such conditions as they think fit; or (to) … refuse planning permission."*

247. I would add that it is of some interest to note that **Holborn Studios** echoed the Irish position at least to the extent that it records that:

> *"Although the relevant legislation contains no provision permitting the amendment of an application for planning permission courts have recognised that amendments to such applications may be made."*[340]

Irish Hardware, 2000

248. **Irish Hardware**[341] was decided under the 1963 Act. Permission had been sought for 12,165m^2 of warehousing comprising 5 retail units. But on foot of an amended proposal in a reply to a request for further information, permission issued for 1 "giant" retail warehouse unit of 9,650 m^2 with a 12,100m^2 garden centre to one side and a 1,912m^2 dry goods store, to the other. Certiorari was sought, inter alia, on the basis that "*the permission granted is for a development materially different*

339 Section 29 of the Town and Country Planning Act 1971.
340 Citing Inverclyde District Council v Secretary of State for Scotland 1982 SC (HL) 64; 1982 SLT 200, HL(Sc) and R (British Telecommunications plc) v Gloucester City Council [2001] EWHC Admin 1001; [2002] 2 P & CR 33.
341 Irish Hardware Association v South Dublin County Council & Barkhill Ltd [2000] IEHC 135. In Irish Hardware Association v South Dublin County Council & Barkhill Ltd [2001] 2 ILRM 291 the Supreme Court refused to hear an appeal for reasons unconnected with the substantive issue.

from the development which was applied for, and this is contrary to a basic principle of planning law." Butler J applied **Abenglen**, accepting that,

> *"…. a Planning Authority can grant permission for something substantially different than that originally applied for. …. The revised plans in question amount to a modification. I do not accept that what, in effect, is a change from five retail warehousing units to one very large retail (unit) amounts to a materially different development."*[342]

Notably, in the view of Butler J, development which was *"substantially different"* was yet not *"materially different".* I confess that I might not have rationalised the matter in quite those terms but the result in that case seems well-grounded in Abenglen.

PDA 2000

249. **S.34(1) PDA 2000** read, and, as relevant, still reads, as follows.

> *"Where—*
> *(a) an application is made to a planning authority in accordance with permission regulations for permission for the development of land, and*
> *(b) all requirements of the regulations are complied with,*
> *the authority may decide to grant the permission subject to or without conditions, or to refuse it."*

250. **S.34(2)(a)** provides that when deciding a planning application *"the planning authority shall be restricted to considering the proper planning and sustainable development of the area, regard being had to …"* (there follows a list of specific considerations of planning and sustainable development, such as the Development Plan, Ministerial Guidelines and European Sites).

251. **S.34(4)**, reads, in part, as follows:

> *"(4) Conditions under subsection (1) may, without prejudice to the generality of that subsection, include all or any of the following—*
> (There follows a list of specific condition types.)

252. **S.175(9) PDA 2000** as to local authority own development requiring EIA, was very similar to S.34(1):

> *"The Board may— (a) approve, (b) approve, subject to conditions, or (c) refuse to approve, a proposed development under this section."*[343]

342 Emphasis added.
343 This is its 2000 form. As will be seen, it was amended in 2018.

253. Shadowmill pointed to the non-exhaustive list of permissible planning conditions S.34(4) PDA 2000 as expressly "*without prejudice to the generality of*" the power under S.34(1) to impose conditions but as nonetheless notable for the absence from the list of conditions for the omission of parts of the proposed development. I confess I am not much convinced by that argument.

British Telecoms v Gloucester, 2001

254. I mention this case[344] as it considered Wheatcroft and was cited in Dietacaron. It concerned an outline planning application for a large mixed-use development on a site near the centre of Gloucester. The case is complex. It suffices to say that the application was amended to

- omit a court building and some housing.
- add a multiplex cinema and a multi-storey car park.
- extend the site to include new areas.

Public consultation ensued. British Telecoms submitted that the amendments were so significant that they ought to have been refused and the planning authority ought to have required a new planning application. Though quashing the permission on other grounds, Elias J dismissed that submission saying:

> *"It is inevitable in the process of negotiating with officers and consulting with the public, that proposals will be made or ideas emerge which will lead to a modification of the original planning application. It is plainly in the public interest that proposed developments should be improved in this way. If the law were too quick to compel applicants to go through all the formal stages of a fresh application, it would inevitably deter developers from being receptive to sensible proposals for change. In my view the following observations of Lord Keith[345] …… are relevant, albeit made in a different context:*
>
> > *"This is not a field in which technical rules would be appropriate; the planning authority must simply deal with the application procedurally in a way just to the applicant in all the circumstances. There was no good reason why amendment of the application should not be permitted at any stage if that should prove necessary in order that the whole merits of the application should be properly ascertained and decided on".*
>
> *I would add that of course the interests of the public must also be fully protected when an amendment is under consideration. They were, however, fully protected in this case by the detailed consultation that took place in respect of the amendments.*

344 British Telecommunications Plc & Anor v Gloucester City Council [2001] EWHC Admin 1001 (26th November 2001).
345 in Inverclyde District Council v Lord Advocate and Others (1981) 43 P.&C.R. 375.

A highly practical approach to the question of amendments was adopted …… in Britannia (Cheltenham) Ltd. v Secretary of State for the Environment and Tewkesbury Council … [the judge]

> *".. thought it was competent for the applicants and the planning authority to agree a variation of an application at any time up to the determination of the application. To take any other view would fly in the face of everyday practice and make the planning machine even more complicated than it was, for it was common practice for an application to be amended by agreement following negotiations between the applicant and the planning officer."*

……. Indeed in many, and perhaps most, cases I would not have thought that it is necessary for the planning authority, or the officer to whom the power to accept amendments is delegated, formally to ask whether or not a fresh application is required. The answer will so obviously be "no" that the issue does not arise. Even where it does arise, provided there is a proper opportunity given for adequate consultation, and that any other potentially relevant matters are taken into account, such as whether the amendment requires the modification of an environmental impact statement, it is difficult to see in most cases what prejudice is suffered by permitting the change to be effected by way of amendment. No doubt there will be cases where the amendment is so far reaching that it is not sensible or appropriate simply to consult over the changes themselves. This will be the position, for example, where the original consultation exercise is, as a consequence of the amended proposals, of little or no value. The appropriate approach then is simply to start again.

…….. the question remains whether the change is so substantial that the application can only be considered fairly and appropriately, bearing in mind both the interest of the applicant and potentially interested members of the public, by requiring a fresh application to be lodged. If the planning officer considers that it can be fairly and appropriately considered by an amendment, and that is not an unreasonable conclusion in the circumstances, the courts should not interfere.

255. Elias J cited **Wheatcroft** as not at odds with his views and made certain comments particular to the English position in planning appeals, the thrust of which was that amendment cannot be used to sidestep the consultation rights of third parties. It bears adding that British Telecoms v Gloucester was approved over the border in **Re HM's Application**[346] and in **Sands**[347]- in the latter of which McCloskey J said that *"the exposition of the governing principles by Elias J conveniently incorporates the most authoritative statement of the House of Lords*[348] *on this topic."*

256. While the emphasis on fair procedures in British Telecoms v Gloucester is perfectly orthodox, it bears repeating in its light that there is no fair procedures challenge in this case. In its espousal of a "*highly practical approach*" British Telecoms v Gloucester is consistent with the view of natural

346 Re HM's Application [2007] NICA 2 at [52]-[55].
347 Sands v Newry and Mourne District Council [2018] NIQB 80.
348 In Inverclyde District Council v Lord Advocate and others (1981) 43 P. & CR 375.

justice taken in **Wexele** that what was required was the application of broad principles of commonsense and fair play.

Dietacaron & White, 2004

257. In **Dietacaron**[349] Quirke J. dismissed a challenge to the Board's invitation, under **Art 73 PDR 2001**, and after an oral hearing, of revised plans[350] for a large mixed-use development[351] which had been refused permission by the planning authority. That invitation, recorded the Board's view that the site was "*generally suitable for development of the type proposed, including the quantum of retail space*", but "*as currently designed, the development is not acceptable and requires modification*." The invitation identified what the Board considered to be the "*main problems*".[352] It specified in some detail of what a "*modified design*" should consist.[353] The resultant revised plans showed what Quirke J called "*significant changes*" – "*in particular*": (i) the site layout differed substantially; (ii) the podium design … was omitted; (iii) the hotel location was altered and its height almost quadrupled; (iv) the overall quantum of development was reduced and the plot ratio was reduced from 1.48 to 1.29; (v) the number of residential units was reduced from 1031 to 557, with 304 student residential units eliminated and the residential area reduced by 8.97% (from 68,682 m^2 to 57,000 m^2); (vi) the social composition of the mix of uses was altered – as was the massing and height differentiation throughout the development; (vii) although the overall quantum of retail floor space remained the same, the design year was changed from 2006 to 2009. I set out these details to illustrate my respectful agreement with Quirke J that the changes were, indeed, "significant".

349 Dietacaron Ltd v An Bord Pleanála and Everglade Properties Ltd, South Dublin County Council, Quarryvale Two Ltd and Quarryvale Three Ltd [2004] IEHC 332; [2005] 1 I.L.R.M. 32.

350 Which phrase I will use to encompass revised plans, drawings and proposals.

351 The permission sought was for a development, on an 8.90ha site, comprising, inter alia; 1,029 apartments, 16,962m2 of offices, a 252-bedroom hotel, a 26,342m2 shopping complex, a 10-screen cinema, leisure facilities including a gymnasium, a bar and a restaurant, 2,312 car parking spaces at three levels, and a sophisticated infrastructure including a covered pedestrian main street, with connection links to a proposed new rail station and a future metro interchange. The residential, retail and commercial units totalled 130,190m2, with some buildings ranging 6, to 8 stories over street level.

352 The notice included observations on urban design framework, the architectural concept, the street hierarchy, the residential element, office parking, the development of lands to the north of the development, the rail station, the motorway, community facilities, phasing and some drawings and models.

353 "The modified design should provide the following:
1. A hierarchy of public streets and public spaces which maximises permeability and connectivity with adjoining lands. This should include a tree-lined primary street network linking main specific spaces together with a coherent pattern of secondary and tertiary streets. Dead frontage should be minimised.
2. A decreased plot ratio and a reduction in the general height of the development by two floors, punctuated by the introduction of some higher buildings at model points.
3. Omission or significant modifications of the podium.
4. A reduction in the total number of residential units, a significant decrease in the amount of student housing and a substantially increased proportion of two and three bedroom units.
5. Enhanced environmental conditions for residential accommodation by increased spacing between blocks, improved sunlight penetration and omission/reduction of deck access units.
6. A reduction in the quantum of office accommodation and/or increased parking provision to serve such development.
7. Omissions/re-design of Block J and the hotel.
8. More detailed proposals in relation to the siting, design and funding of the railway station, in order to give assurance, regarding the development of this facility.
9. More detailed proposals in relation to treatment of the motorway reservation and its possible future development. Omission of any development over the reservation in the immediate future.
10. Inclusion of additional community (leisure-sports or cultural facilities) to cater for the substantial population in the development.
11. More precise information regarding possible phasing.
12. Improved presentation of information in drawn form and provision of models."

258. The applicant for judicial review sought to quash the invitation on as jurisdictionally ultra vires.[354] It submitted that the Board's proposed changes, exceeded "modification" as envisaged by Art 73 and would alter the development to such an extent as to render it fundamentally different - so radically changed - from that for which permission had been sought, that in effect it represented a new planning application. The Board said that the changes would reduce the scale of development and reconfigure elements within it and would not so fundamentally alter the essential nature and character of the development as to comprise the submission of a new planning application for a wholly different development.

259. Quirke J observed that what mattered before him was the content of the Board's invitation, not that of the revised plans it prompted. He observed that the applicants for judicial review could submit to the Board that those revised plans exceeded modifications. However, Quirke J noted that the Board had tacitly acknowledged that, prima facie, the revised plans were not necessarily outside the terms of the invitation. He held that the court could not undertake the assessment of the nature and extent of "modifications" and their comparison with the development for which permission was sought, to establish whether the changes invited so radically alter the nature of the development as to comprise a new planning application. As applicable to such an assessment, Quirke J observed that in general, courts should be extremely slow to interfere with the decisions of experts in planning matters. He rejected the submission that he should review the changes the Board had invited, to establish whether those changes altered the proposed development as the Applicant for judicial review alleged. To do so would be to make a finding of fact inconsistent with the view of the Board (as expressed in its invitation) and so, impermissibly, enter on the merits of the invitation.

260. Quirke J considered that the real issue was that *"It is that right of public participation in the planning process that the courts will be concerned to protect and vindicate."* He considered that the principle identified and the test to be applied in **British Telecoms v Gloucester**[355] were relevant.[356] He rejected an irrationality argument[357] saying *"I have no hesitation in showing curial deference to the board…."*

261. While, as has been noted, no fair procedures case is directly made by Shadowmill, it bears observing that Quirke J in Dietacaron cited **White**[358] in which the Supreme Court considered the discretion of a planning authority to invite revised plans or drawings modifying a proposed development. Simplifying the facts somewhat, against a background of refusal of an earlier planning application, the Whites had satisfied themselves that their neighbours' planning application was for a domestic extension which did not overlook their home and so did not object. Unbeknownst to the Whites, the Council later accepted revised plans for an extension which did overlook their home. As

354 The applicant argued in the alternative that the board's view that the changes which it required were "modifications" and amounted to anything other than a new planning application were irrational.
355 In terms including those I have set out above.
356 Quirke J also observed that the views of Walsh J in Abenglen were obiter - see above.
357 Made as an alternative to the jurisdictional argument.
358 White v Dublin City Council [2004] 1 I.R. 545; [2004] 2 I.L.R.M. 509.

they had not objected they were not told of the revised plans. The revised plans were not re-advertised as the Council decided that the amount of overlooking was acceptable. The consequence was that the Whites had no reasonable means of knowing that the plans had been revised. The Whites sought judicial review of the resultant planning permission.

262. The High Court quashed the decision not to re-advertise as irrational. The Supreme Court dismissed the appeal. Fennelly J agreed that the Court should be extremely slow to interfere with the decisions of experts in planning matters. The regulation gave a substantial discretion to a planning authority and envisaged a wide range of cases in which modifications to a planning application should not require new public notices, but the radical nature of the changes to the application made the case exceptional. The Council had in effect decided, without hearing possible objectors, that there was no reasonable basis for objection. It failed to consider the history of the planning applications. Its decision was irrational not in the broad sense[359] but given the very particular circumstances of the case. The Council did not properly consider the radical effect of the modifications and the likelihood that the Whites would want to object. Special to the case was the factor that the Council had trodden "*a very fine line*" in requiring modifications sufficient to differentiate the application from the earlier refusal but which it deemed insufficiently different to warrant a new public notice.

263. It seems to me clear that the Supreme Court considered White peculiar to its facts, or at least to be a case in which the interest of the Whites in objecting specifically to the revision of the proposed development was obvious. It clearly was a case in which the Whites were able to point to a clearly discernible prejudice in their being deprived of the opportunity to object. Shadowmill points to no such prejudice by reason of the omission of Block B – by reference either to its interests or those of local residents. Presumably because it cannot point to such prejudice, it was forced to climb towards the higher ground and the thinner air of a plea that the mere general possibility of such prejudice is demonstrative that the jurisdiction does not even exist.

Later Amendments of the PDA 2000 – and other Statutes

264. Shadowmill contrasted with S.34(1) PDA 2000 the following provisions:

- The 2006 amendment[360] of **S.175 PDA 2000** as to local authority own development requiring EIA. It added, in **S.175(5)(a)(ii)**, an explicit power in the Board to invite local authority to alter its application as the terms of its proposed development and added, in **S.175(9)(a)**, an explicit power to "*approve, in part only, the proposed development*".[361] (Lilacstone rely on that provision

359 By which I think was meant that it was not irrational in the sense of there being no evidence to support it – the test set in O'Keeffe v An Bord Pleanála [1993] 1 IR 39, which Fennelly J cited.
360 Planning and Development (Strategic Infrastructure) Act 2006 (27/2006), s. 34.
361 S.175(9)(a) now reads: "The Board shall, in respect of an application for approval under this section of proposed development, make its decision within a reasonable period of time and may, in respect of such application —
(i) approve the proposed development,

as demonstrating that there is nothing in principle wrong with approval of part only even in an application requiring EIA).

- The 2006 amendment inserted **S.175(9)(b)**, which is short, non-exclusive, list of possible "community gain" conditions – which Shadowmill especially contrasts with the absence of such provision in its 2000 predecessor. I do not see that the contrast as to conditions much advances Shadowmill's argument.
- **S.181B(6) PDA 2000**, also inserted in 2006,[362] as to development by State authorities requiring EIA - also in substance in the same terms as S.175(9)(a) above.
- The 2006 amendment[363] introduced a new **S.37E** and **S.37G PDA 2000** whereby the Board was explicitly empowered to grant SID[364] permissions for "*part of the proposed development*".
- Shadowmill did not cite, but one may add to the list, **S.182B(5) & S.182D(5) PDA 2000,** also inserted in 2006,[365] - as to approval of electricity transmission lines and of strategic gas infrastructure development - in substance in the same terms as S.175(9)(a) above.
- **S.177AE(8)(a)(iii) PDA 2000**, inserted in 2011,[366] as to development by local authorities requiring AA[367], is also in substance in the same terms as S.175(9)(a) above.
- **S.9(4)(d) of the 2016 Act**[368] specifically allows the Board to grant permission for proposed SHD development "*in part only*".
- **SS.181(2C)(b), (2D), (2E), (2F), & (2L)(a) PDA 2000** inserted in 2019,[369] – as to development by State authorities – permit *"alterations to be made to the terms of the proposed development"* and explicit power to "*approve, in part only,"* and stipulate procedures, including publication, to that end.

Shadowmill also contrasted **S.51** of the **Roads Act 1993** permits the Board to *"approve a proposed road development, with or without modifications".*

(ii) make such modifications to the proposed development as it specifies in the approval and approve the proposed development as so modified,
(iii) approve, in part only, the proposed development (with or without specified modifications of it of the foregoing kind), or
(iv) refuse to approve the proposed development,
and may attach to an approval under subparagraph (i), (ii) or (iii) such conditions as it considers appropriate."

362 Inserted (31.01.2007) by Planning and Development (Strategic Infrastructure) Act 2006 (27/2006), s. 36, S.I. No. 684 of 2006.
363 Inserted (31.01.2007) by Planning and Development (Strategic Infrastructure) Act 2006 (27/2006), s. 36, S.I. No. 684 of 2006. S.3
364 Strategic Infrastructure Development.
365 Inserted (31.01.2007) by Planning and Development (Strategic Infrastructure) Act 2006 (27/2006), s. 4.
366 Substituted and inserted (21.09.2011) by European Union (Environmental Impact Assessment and Habitats) Regulations 2011 (S.I. No. 473 of 2011), reg. 15.
367 Appropriate Assessment pursuant to the Habitats Directive.
368 Planning and Development (Housing) and Residential Tenancies Act 2016.
369 Inserted (6.08.2019) by European Union (Environmental Impact Assessment and Habitats) (Section 181 of the Planning and Development Act 2000) Regulations 2019 (S.I. No. 418 of 2019), reg. 4(a)(ii),(b).
(2C) The Board may— …….
(b) if it is provisionally of the view that it would be appropriate to approve the proposed development were certain alterations (specified in the notification referred to in this paragraph) to be made to the terms of the proposed development, notify the Minister concerned that it is of that view and invite that Minister to make to the terms of the proposed development alterations specified in the notification and, if the Minister concerned makes those alterations, to furnish to it such information (if any) as it may specify in relation to the proposed development, in the terms as so altered, or where necessary, a revised environmental impact assessment report or revised Natura impact statement or both that report and that statement, as the case may be, in respect of it.
(2E) The Board shall—
(a) where it considers that any further information furnished to it pursuant to a requirement made under subsection (2C)(a) contains significant additional data relating to the likely significant effects on the environment or adverse effects on the integrity of a European site, as the case may be, of the proposed development, or
(b) where the Minister concerned has made the alterations to the terms of the proposed development specified in a notification given to him or her under subsection (2C)(b), require the Minister concerned to comply with subsection (2F).
(2F) Where subsection (2E) applies the Minister concerned shall—
(a) publish in one or more newspapers circulating in the area or areas …….. and that submissions or observations in relation to that information, report or statement may be made to the Board ……..

Statutory Interpretation by reference to later enactments.

265. Shadowmill cites **Bennion**[370] as to "*Inferences from later Acts*" to the effect that where the legal meaning of an enactment is doubtful, subsequent legislation on the same subject may be relied upon as persuasive authority as to its meaning. Bennion cites, inter alia Lord Sterndale MR in **Cape Brandy**[371] to the effect that,

> *"…… subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier."*

266. However, it does not seem to me that Lord Sterndale's observation is apt to a proposition that, by later legislation making express a particular type of exercise of the power to grant or refuse approval for particular developments (part-grant/refusal), the Oireachtas must be considered to intend to repeal that particular type of exercise of a similar power implicit in earlier legislation or to imply that the implication of such power was erroneous. That later legislation is more convincingly explained – at least in this instance - by the view that, when creating new powers, the Oireachtas sensibly took the opportunity to make express in those new provisions what was – and was to remain – implicit in S.34(1).

267. Bennion also observes that "*Where an Act is passed which on one (but not the other) of two disputed views the existing law is unnecessary, this may be taken to suggest that the other view is correct*". This observation[372] was approved in **National & Provincial Building Society v Lynd**.[373] And, repeating the same proposition, Bennion states that where one construction would render a later act superfluous, the presumption that the legislature does nothing in vain may be relevant. Bennion cites **Murphy v Duke**[374] in which it is stated that "*Parliamentary time is sufficiently precious for Parliament not to pass unnecessary Acts of Parliament. It seems to me that the Trading Representations (Disabled Persons) Act 1958 would have been quite unnecessary had the activity of selling goods of these descriptions in those circumstances already been a breach of the requirements of the House to House Collections Act 1939.*"

370 Bennion, Bailey and Norbury on Statutory Interpretation/Part 7 External Aids to Construction/Chapter 24 External Aids to Construction/Parliamentary history and later material/Section 24.19: Inferences from later Acts.
371 Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 2 K.B. 403.
372 from an earlier edition of Bennion.
373 [1996] NI 47.
374 [1985] 2 WLR 773 – A later case dissented from this decision on what Bennion describes as doubtful grounds.

268. While that observation may have been be true of Oireachtas time wasted on an entire Act, here the generality of the amendments to the PDA 2000 were in any event necessary to update the PDA 2000 by reference to EU Law requirements as to EIA and AA and to provide special planning powers and regimes for particular forms of development, such as Strategic Infrastructure. One could regard the specific amendment of s.175(9) to explicitly state the power to approve part of a Local Authority development as merely having availed of that opportunity to make existing law explicit in the context of other amendments to S.175.

269. Nor is it inevitable that a later act sheds light on the interpretation of an earlier Act.[375] In a passage I confess to finding persuasive here, Bennion also observes,

> *"One of the practical objections that may be made in relation to reliance on later legislation is that it is seldom likely to provide a reliable basis for drawing inferences as to the meaning of earlier legislation. While a proposition in a later Act may indicate an intention to reverse or change the previous law, it may equally be explained by other reasons. For example, the later Act may be intended as a declaratory enactment or to put matters beyond doubt. Or the legislature may be content to set out the position for the future without intending to alter the existing law."*[376]

270. In my view, all that is to be taken from the later legislation in present circumstances is that the parliamentary draftsperson sensibly thought it proper to make explicit in the powers later created, a power which might well usefully have been made explicit in S.26 of the 1963 Act and in S.34(1) PDA 2000 when they had been enacted but which had nonetheless been implicit in both and had been well-established in practise prior to the enactment of S.34.

Weston, 2008

271. In **Weston**,[377] as to the power to impose planning conditions, MacMenamin J, for reasons with which I respectfully agree and need not repeat, preferred to the obiter of Walsh J in Abenglen, the judgment of Hardiman J in **Ashbourne** as *"more authoritative"* to the effect that a condition could be imposed under s.34(1) even if not within the scope of the specific conditions identified by s.34(4). MacMenamin J considered that:

> *"Provided that the condition lies outwith the scope of any specified condition, it may, subject to the objectives of the Act and rational justification, be imposed. … Unless the power exercised comes within the scope of any one of the 17 specified circumstances (when it will require to be strictly construed), the power otherwise, and the jurisdiction vested, is a "general" one, provided*

375 Mexico Infrastructure Finance LLC v Corporation of Hamilton [2019] UKPC 2 §61 – in which Cape Brandy was considered.
376 Bennion, Bailey and Norbury on Statutory Interpretation/Part 7 External Aids to Construction/Chapter 24 External Aids to Construction/Parliamentary history and later material/Section 24.19: Inferences from later Acts
377 Weston v An Bord Pleanála and South Dublin County Council (MacMenamin J.) [2008] IEHC 71; [2008] 2 IRLM 542.

it is lawfully and rationally imposed in the interests of proper planning and sustainable development. Thus, such a condition to be justified in law must rationally accord with the stated objectives of proper planning and sustainable development."

Clinton, 2006 & MAK, 2018 & Mogul, 1976 - (Re-Enactment & Stare Decisis)

272. In **Clinton**[378] the Supreme Court interpreted S.50(4)(f) PDA 2000, which limited certain appeals from decisions of the High Court in planning matters[379] to those in which the High Court had certified that the decision involved a point of law of exceptional public importance. S.50(4)(f) reproduced identical language used in S.29 of the Courts of Justice Act 1924 as to certification of appeals from the Court of Criminal Appeal. It had been long-since held that an appeal under the 1924 Act was not limited to the point certified.[380] Fennelly J. for the Supreme Court said:-

"[61] In this legal context, the re-enactment of the relevant provisions of s 19(3) of the Act of 2000 must be regarded as indicative of a legislative intention to continue the interpretation which had been generally and consistently followed to date.

[62] It was in this context that the applicant submitted that the Oireachtas must be presumed to have enacted the legislation in the knowledge of the legal and judicial history of the wording and with the intention, or at least on the assumption, that it would be accorded the same meaning. The proposition is thus expressed in Bennion, Statutory Interpretation (4th ed., 2002) at p. 511:-

'Under the Barras principle[381] *… where an Act uses a form of words with a previous legal history, this may be relevant in interpretation. The question is always whether or not Parliament intended to use the term in the sense given by this earlier history*.'"

273. In **MAK**[382] the Supreme Court unanimously took the view, citing **Clinton**, that the re-enactment of a statutory provision was regarded as indicative of a legislative intention to continue an interpretation that had been generally and consistently followed to that time. The approach is that the Oireachtas knows the law and legislates in the light of it. As so often in statutory interpretation, it applies as a matter of presumption or an interpretative approach and as a factor to be taken into consideration, rather than a binding or conclusive rule. In MAK, the issue was approached both through the Barras principle and the test set out in **Mogul**.[383] The court in MAK took the view that the application of the interpretive decision it was invited to overrule had *"become inveterate and*

378 Clinton v An Bord Pleanála, Dublin City Council et al [2006] IESC 58, [2007] 1 IR 272.
379 in a regime since replaced.
380 The People (Attorney General) v Giles [1974] IR 422 – affirmed in People (DPP) v Gilligan (No 3) [2006] IESC 42, [2006] 3 IR 273 as having been applied consistently ever since as being the law.
381 After the decision of the UK House of Lords in Barras v Aberdeen Steam Trawling and Fishing Co [1933] AC 402.
382 MAK v The Minister for Justice and Equality [2019] 1 IR 217.
383 Mogul of Ireland v Tipperary (NR) CC [1976] IR 260.

acted on that basis to such an extent that greater harm would result from overruling it than from allowing it to stand."

274. In **Mogul**, the Supreme Court affirmed its general adherence to the doctrine of *stare decisis* – contemplating departure from a previous decision only for *'the most compelling reasons*' or, which is the same, where the *'Court is clearly of opinion that an earlier decision was erroneous it should be at liberty to refuse to follow it, at all events in exceptional cases*'. Indeed it held that even if the later Court is clearly of opinion that the earlier decision was wrong, it may decide in the interests of justice not to overrule it if it has become inveterate and if, in a widespread or fundamental way, people have acted on the basis of its correctness to such an extent that greater harm would result from overruling it than from allowing it to stand. In such cases, the maxim *communis error facit jus* applies.[384] In **MAK**, O'Donnell J applied **Mogul**, in not overruling the earlier decision[385] on what was a pure question of statutory interpretation - there were no new factors, no shift in the underlying considerations, and no suggestion that the decision had produced untoward results not within the range of that court's foresight.

South-West Regional Shopping Centre, 2016 (Settled Practice)

275. In **South-West Regional Shopping Centre**[386] Costello J addressed an argument that the Planning Acts did not expressly provide for, and could not be read as impliedly providing for, a general power to grant planning permissions to amend earlier such permissions. That, it was argued, was especially so since the introduction in 2006 of ss. 146A-146D of the 2000 Act which had provided a specific but limited power to do so. This was an argument analogous to that which Shadowmill now makes as to the significance of post-2000 amendments of the 2000 Act. It failed.

276. The general practice of issuing such amending permissions had long-since – for decades - been endemic. The Board commended the practical virtues of the practice, commonly availed of for technical, on site, commercial and other reasons and without which, it said, the planning code would become unworkable and extremely burdensome upon developers, planning authorities and the public in respect of all but the simplest of developments. The developer argued that, in failing in 2006 legislation to exclude such a well-established practice, the Oireachtas effectively approved it.

277. Costello J upheld the power to grant amending permissions, as follows:

> *"In my opinion the Oireachtas was entitled to take notice of, and have regard to, the very widespread practice of amending planning permissions in the manner which has occurred here*

384 Citing Bourne v Keane [[1919] AC 815]; Ross Smith v Ross Smith [[1963] AC 280]; [Reg. v Nat. Ins. Comr., Ex p. Hudson [1972] AC 944].
385 in Smith v Cavan & Monaghan Co Councils [1949] IR 322.
386 South-West Regional Shopping Centre Promotion Association Ltd v An Bord Pleanála [2016] IEHC 84 (High Court, Costello J, 4 February 2016).

when it enacted the provisions of in 2006. In the decades preceding this enactment, there had never been a suggestion that the many amending grants of planning permission by planning authorities and the Board were all ultra vires and void. I do not believe that in enacting the provisions of ss. 146A-146D, the Oireachtas intended to radically and drastically limit a widespread existing power to grant planning permissions which amended existing extant planning permissions. Furthermore, I do not accept that if this had been the intention of the Oireachtas that it would not have made such intention explicit and clear. Until the applicants advanced this argument in this case neither the Board, the Planning Authority, professional planners, nor indeed the applicants' solicitors had believed that the sole power to amend planning permission was to be found solely and exclusively in ss. 146A-146D of the 2000 Act.

On the contrary, had the Oireachtas been of the view that (a) there was no power under the existing planning code to amend planning permissions by applying for, and obtaining, grants of planning permission which revised or modified extant grants of planning permission, and (b) despite the absence of any such power, there was a long standing common practice to grant such permissions, and the Oireachtas wished to ensure that there was to be a very limited power of amendment confined solely to the provisions of ss. 146A-146D of the 2000 Act, it would have made it clear that the power to amend planning permissions was confined solely to the provisions it was enacting. Such a significant change would not have been left to be divined by implication, as is the case here, if the applicants' argument is correct. I believe it is not."

278. In my view, this decision is significant by analogy in its recognition of the legal significance of a widespread, long-standing and well-established practice – at least when, knowing of it and when recodifying planning law in the PDA 2000, the Oireachtas had not chosen to countermand it.

279. I note that this view is consistent with at least some views of the law taken in the UK – though the position is said to remain unclear there. **Bennion**[387] records that the UK Supreme Court split on the issue in **H & N**.[388] Lord Carnwath took the view that in statutory interpretation "*pragmatism and indeed common sense have a legitimate part to play*" and that:

''… settled practice may, in appropriate circumstances, be a legitimate aid to statutory interpretation. Where the statute is ambiguous, but it has been the subject of authoritative interpretation in the lower courts, and where businesses or activities, public or private, have reasonably been ordered on that basis for a significant period without serious problems or injustice, there should be a strong presumption against overturning that settled practice in the higher courts"

Lord Hodge agreed[389] with Lord Carnwath. Lord Neuberger and Lady Hale both dissenting, doubted his view.[390]

387 Bennion, Bailey and Norbury on Statutory Interpretation/Part 7 External Aids to Construction/Chapter 24 External Aids to Construction/Parliamentary history and later material/Section 24.20: Judicial decisions and settled practice.
388 R (ZH and CN) v London Borough of Newham and London Borough of Lewisham [2014] UKSC 62, [2015] AC 1259.
389 §53 - with whom Lords Wilson, Clarke and Toulson JJSC agreed.
390 §§ 148 & 168.

280. It does seem to me that, ceteris paribus, settled practice is apt to be the more persuasive where it has been, as here, succeeded by the activity of the Oireachtas by way of re-enactment of the statutory provision on which the settled practice had developed. That is because, in a manner analogous to the Barras principle (though settled practice seems to me a distinct interpretive aid), it may be assumed that the Oireachtas was aware of the practice when re-enacting the provision.

281. Bennion also cites **Bailey**[391] for his approval of reliance on settled practice in statutory interpretation. Incidentally, Bailey asserts the necessity of evidence of a settled practice. While that may be necessary in a given case, I am satisfied for the purpose of this case that the practice of part-grant/part-refusal of planning applications is so notorious that I may take judicial notice of it. If I am wrong in that regard, I note that, in any event, Shadowmill – in my view entirely correctly – did not dispute that the practice had existed since the 1963 Act took effect.

282. Returning to the legitimacy of having regard to settled practice, for my part and on the basis of stare decisis, I should regard **South-West Regional Shopping Centre** as the law in Ireland to the effect that settled practice is relevant to statutory interpretation if circumstances suffice. In general terms, I agree with Bailey when he suggests that in practice the cases where settled practice is of significant probative value are likely to remain relatively rare. But I do think that the present is one of those rare cases - though, as will have been seen, settled practice is not the only basis on which I draw my conclusion as to the jurisdiction under S.34(1) to part-grant and part-refuse a planning application.

Holborn & Suliman

283. I have referred to these English cases already.[392] Notably, they adopt a bifurcated approach: to the effect that *"it is necessary to distinguish the substantive and the procedural constraints on the power of a local planning authority to grant planning permission for a development other than that for which an application was originally made."* They considered that those constraints had been conflated in Wheatcroft.

284. The substantive limitation turns on whether the change is substantial or whether the development is not in substance that which was originally applied for. It applies whether or not others have been consulted about the change. However, it was notably held that under **S.70(1) of**

391 Cambridge Law Journal/2022 - Volume 81/Issue 1, 1 March/Articles/SETTLED PRACTICE IN STATUTORY INTERPRETATION – The Cambridge Law Journal, 81 [2022], pp 28–49.
392 The relevant content of Holborn can be found in Suliman at §36. More generally, Suliman reviews the English cases since Wheatcroft.

the 1990 Act[393] "*a planning authority may grant planning permission for part of the development applied for and to refuse permission for another part where such parts are separate and divisible".* S.70(1) is in terms very similar to S.26 of the 1963 Act and S.34(1) PDA 2000.

285. The procedural constraints essentially related to fair procedures and public participation –

> *"any subsequent amendment to an application or the imposition of a condition that has the effect that the permission is granted for a development which is not that for which the application was made may deprive those notified and the public of the opportunity to make representations that the statutory scheme requires them to be given in relation to the application if it is to be entertained and determined." And these constraints likewise applied "when permission is granted only for part of what an application for planning permission was for or when it may be granted subject to a condition which may alter what such an application was for .."*[394]

286. In my view these cases, while valuable reminders of the necessity for fair procedures and while cases which may on particular facts and pleadings inform the outcome of a given judicial review, must be read in Ireland in the particular light of **Wexele** and **Frank Harrington** as to the necessity of adducing evidence of substantive prejudice in terms of what might have been submitted had the opportunity been afforded. Even in its own terms, Holborn observes that fairness is not an absolute or abstract concept: certiorari issues only where a decision is "*so unfair as to be unlawful*"[395] – "*it is not sufficient to establish that a decision is unlawful merely to show that it would have been better or fairer for there to have been reconsultation*." In **Cherwell v Oxfordshire**[396] Mostyn J helpfully considered the concept of unfairness for purposes of judicial review. I set out only excerpts here:

> *"…… at its heart a judgment about what is fair is intensely fact-specific and is instinctive and intuitive. Ultimately, I think it is likely to be determined by the "I know it when I see it" legal technique."*
>
> *"The test is now*[397] *stated to be that the court must be satisfied that the process was "so unfair" as to be unlawful. The use of the adverb "so" shows that there is a threshold to be surmounted. In my judgment, the court will only be satisfied that the unfairness renders the process unlawful if the unfairness is significant. In this regard, the court will look with especial care at the materiality of the alleged flaws."*

393 Town and Country Planning Act 1990, S.70(1) "Where an application is made to a local planning authority for planning permission— (a) … they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or (b) they may refuse planning permission."
394 Citing Granada Hospitality Ltd v Secretary of State for the Environment, Transport and the Regions (2000) 81 P & CR 36, para 73; and Coronation Power Ltd v Secretary of State for Communities and Local Government [2011] EWHC 2216 at [23]–[29].
395"The test is whether the process has been so unfair as to be unlawful": citing the Keep Wythenshawe Special case 148 BMLR 1, §§77 and 87, per Dove J; and R (West Berkshire District Council) v Secretary of State for Communities and Local Government [2016] PTSR 982, §60.
396 Cherwell District Council and others v Oxfordshire CCG [2017] EWHC 3349 (Admin) §12.
397 Mostyn J said that in one case, it was said it had to be shown that something had "clearly and radically" gone wrong, but the courts have rowed away from that acid test.

This view seems consonant with Charleton J's citation in **Wexele** of **Haverty** as to the application of broad principles of commonsense and fair play to a given set of circumstances and to the effect that what will be required must vary with the circumstances.

287. It also seems to me that the type of reasoning as to unfairness described by Mostyn J, while appropriate to a fair procedures challenge, illustrates that such a challenge must be pleaded as such as it would be much less appropriate form of reasoning for determining, as a matter of statutory interpretation, the scope of the statutory jurisdiction under S.34(1). And to return, no doubt by way of excessive repetition, to the important point, no fair procedures ground was pleaded here – only a jurisdictional ground was pleaded.

3.1 - Omission of Block B - Conclusion

288. In my view there is a very considerable analogy between the practise of amending planning permissions at issue in **South-West Regional Shopping Centre** and the practise at issue in the present case: of issuing permissions for reduced developments as compared to those sought. Both practices have been general for decades and must be presumed to have been well-known to the Oireachtas in enacting the PDA 2000 as the general understanding of the power conferred by S.26 of the 1963 Act. I consider that the Oireachtas, in reusing in S.34(1) the terminology of S.26, given the practice of part-grants was so well- and long-established, and though the Barras principle of statutory interpretation must be applied with caution[398] and even though the pre-2000 legal history may fall short of the clear judicial interpretation[399] which normally triggers application of that principle, is to be taken nonetheless and also on the authority of **South-West Regional Shopping Centre**, as recycling not merely the language of S.26 but the general understanding of its effect.

289. The case before me is not a case, as was the case in **Mogul, Clinton** and in **MAK**, of stare decisis - a prior clear judicial interpretation of a statute. It is, rather a case of an endemic practice based on an understanding of S.26 and S.34 since 1963, bolstered in at least considerable degree by decisions such as **Fortunestown, Abenglen** and **Dietacaron** and no less than three significant academic texts predating the enactment of the PDA 2000 . I consider that, as in MAK and in Mogul, the application of that interpretation had *"become inveterate and acted on on that basis to such an extent that greater harm would result from overruling it than from allowing it to stand."*

290. I hold that at its enactment in 2000, S.34(1) encompassed an implied power to grant a permission for part-only of a development for which permission had been sought.

398 See generally, Dodd on Statutory Interpretation §8.48 et seq & cases cited therein.
399 In this case of S.26 as to split planning decisions.

291. I need not on the pleadings in this case, and do not, decide any issue of any fair procedures limitations on the exercise of such a power. However I consider that there is at least appreciable weight in the observation by counsel for the Board that, "*what we have here is the omission of something and permission granted for what the public did have an opportunity to comment on*" and where the difference between the sought and permitted development is subtraction from that sought, then, at least as a general proposition and where no evidence to the contrary is adduced, "*everything for which permission has been granted [and sought] has been subject to public consultation and is capable of assessment*" such that "*on balance, omission is, .. less likely to be objectionable*."*"*[400]

292. Returning to the implied power, I am fortified in my view by the consideration that, as the Supreme Court observed in **Heather Hill**,[401] the primary principle of statutory interpretation is to seek to ascertain the presumed intent of the Oireachtas as disclosed in the objective and literal meaning of its text in context. Murray J said that context is a "*strikingly broad*" concept and *"the state of the law prior to the enactment and the purpose of the enactment are indispensable instruments for construction"*[402] Another description of the "*purpose of the enactment"* is *"the mischief which the Act sought to remedy*".[403] Of course, here I am concerned not, primarily at least, with interpreting text but with interpreting its absence – the absence from S.34(1) of the words "*in part only*" or similar words. And I am to interpret that absence in S.34(1) PDA 2000 as a repetition of that absence in S.26 of the 1963 Act and in the context of the practice, endemic since 1963, of the grant of permissions "*in part only*" - of which practice the Oireachtas must be presumed to have been aware when enacting the PDA 2000.

293. As to that endemic practice, I note that the "*strikingly broad*" context in which text is to be understood includes the historical context – see the decision of the Supreme Court in **Bederev**.[404] The House of Lords took the same view in **Quintavalle**[405] - *"… the statute as a whole should be read in the historical context of the situation which led to its enactment"* citing authority[406] that *"In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs."* It seems to me a corollary of that presumption that if, in a statute (such as the PDA 2000) directly on point of a state of affairs (as to the making of planning decisions), the Oireachtas chooses not to address an aspect of that state of affairs, it is likely to have considered that aspect not to have been a mischief and so not to require legislative attention. As with any presumption in statutory interpretation, that corollary is far from a black letter rule. It is an aid to interpretation - of more or less assistance, determinative or irrelevant, depending on the circumstances. In present circumstances I think it fair to infer that, had the

400 Day 2 p118 – 121.
401 Heather Hill Management Company CLG v. An Bord Pleanála [2022] IESC 43 (Supreme Court, Murray J, 10 November 2022)
402 Citing The People (DPP) v. AC [2021] IESC 74, [2021] 2 ILRM 305. Per Charleton J.
403 Though this is a negative view of the potential purposes of legislation.
404 Bederev v Ireland, [2016] 3 IR 1, §§38.
405 And see R (Quintavalle) v Secretary of State for Health [2003] 2 AC 687 at [8] per Lord Bingham of Cornhill. "… the statute as a whole should be read in the historical context of the situation which led to its enactment."
406 Lord Wilberforce dissenting in Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800.

Oireachtas, when enacting the PDA 2000, considered the endemic practice of grants of permissions "*in part only*" to be a mischief, it would have enacted s.34(1) PDA 2000 in terms to expressly exclude the practice. It did not. Indeed, its later express enactments allowing such a practice confirm that, far from considering it a mischief, it considered the practice a virtue.

294. I have already addressed the issue above and confirm that in my view the cited amendments of the PDA 2000 in 2006[407] and 2016,[408] in explicitly providing, for purposes of other types of decision, that approval could be given for part-only of a development for which approval had been sought, shed no light on the interpretation of S.34(1) as enacted in 2000. That is save, perhaps, for the obvious and trite insight, as apparent in 2000 as later and without the need for demonstration by the 2006 and 2016 amendments, that what was made implicit in 2000 could, and even desirably should, have been made explicit. No doubt, explicit powers are preferable to implicit powers – not least as reducing litigation, such as this, as to their existence. (As a general observation and broadly, the same can be said as to planning permissions: the more explicitly clear, the less the litigation). However that insight does not, at least in the circumstances of its enactment, countermand the implication of the power in S.34(1) PDA 2000 to grant a permission for part-only of a development for which permission had been sought. And the judgment of Henchy J in **Abenglen** is strikingly demonstrative of the radical changes which such a power can encompass.

295. That leaves the question whether the amendments of the PDA 2000 in 2006 and 2016 impliedly amended S.34(1) to remove the implied power to that effect as to planning permissions. Once a statutory power - whether implied or explicit – exists, it seems to me that, as a general principle, it should not readily be assumed that it has been impliedly revoked sub silentio.

296. Further, as a matter of public policy, the parliamentary draftsperson should not be discouraged from the worthwhile work of making powers explicit by the fear of unintended consequences that thereby they may be repealing similar powers implied elsewhere. More generally, there is good reason not to discourage the parliamentary draftsperson from improvements in legislative drafting by too readily concluding that thereby, by accident or a sidewind,[409] earlier legislation has been amended. That is not to doubt the possibility of statutory amendments implied to avoid statutory contradictions and conflicts – though even that is a rare beast, found reluctantly.[410] The presumption against implicit or accidental alteration – perhaps especially radical alteration – of the law was stated by the Supreme Court **Bederev**[411] and reaffirmed in **Hayes**.[412] The test seems to be demanding – one must ask whether the later statutory provisions are "*so*

407 See above.
408 See above.
409 See Spencer Place Development Company Ltd v. Dublin City Council [2020] IECA 268 Collins J.
410 See generally, Dodd on Statutory Interpretation §4.68 et seq.
411 Bederev v Ireland [2016] 3 IR 1. Charleton J §40.
412 Hayes v. The Minister for the Environment, Community & Local Government [2020] IECA 54 (Court of Appeal (civil), Baker J, 9 March 2020).

inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together?" – **DPP (Purtill) v Murray**.[413]

297. But this is not such a case. Indeed, to the contrary, here the implied power of S.34 is entirely consistent with the explicit powers of the 2006 and 2016 Acts. The presumption against radical change in the law also applies here – perhaps especially so where the wording of S.34 itself has not changed nor been explicitly affected and where the radical change is alleged to have been effected by implication only.[414] It does not seem to me that the 2006 and 2016 provisions just described amount to an implied amendment to S.34(1) or an implied abolition of a power understood to have existed since 1963, to permit developments in part only.

298. Shadowmill makes another argument to the same effect. The proposition that an Act must be interpreted as a whole is well-established. The question is – what "whole" – that pertaining when the section under interpretation was enacted or that pertaining at the time of interpretation, including later amendments of the Act? It could be considered alarming and unpredictable to allow that a section unamended could change its meaning – if not quite by a sidewind, at least unexpectedly. One could take the view that having to have regard to a different "whole" Act depending on the precise date the section under interpretation was enacted would be a recipe for considerable difficulty and confusion – not least with a large, labyrinthine and constantly changing code such as the Planning Acts. It could also over time be destructive of the sense of the Act as having a single "scheme", or at least of its certainty. However I do not think I need decide that issue. On the view most favourable to Shadowmill, taking the Act as whole to be that in its current form, and given the application of the other interpretive techniques described above, I remain of the view that S.34(1) PDA 2000 permits "split decisions" of planning applications

299. **Dodd on Statutory Interpretation**[415] was recently cited by Allen J in **Hurley v Pepper**[416] as to "*Reference to amendments when interpreting the original*" as follows:

> *"This approach is not generally permitted in Ireland. One difficulty with it is that the drafter may labour under an erroneous view of the original law. Secondly, the Oireachtas has no jurisdiction to make authoritative interpretive determinations. …*
> *In addition, submissions that rely on amendment to draw inferences about the original have been rejected on the basis that the later amendment is declaratory only. …"*

413 DPP (Purtill) v Murray, [2015] 1 IR 465, citing Churchwardens, &c, of West Ham v Fourth City Mutual Building Society [1892] 1 QB 654 and DPP v Grey [1986] IR 317; [1987] ILRM 4.
414 See Dodd on Statutory Interpretation §4.74.
415 §4.34 and 4.35.
416 [2022] IEHC 299.

300. In **Droog**[417] the Supreme Court noted, without demur, that Laffoy J in the High Court in that case had applied its decision in **Cronin**,[418] to the effect that a subsequent amendment is at best neutral as to interpretation of a statute in its pre-amendment form. It cannot be used to construe the statute as it was before the amendment. It is for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be. Barr J in **Cassidy**[419] likewise applied the view taken by Laffoy J in Droog. Similar observations were authoritatively made in **Bookfinders**.[420] However O'Donnell J in **Bookfinders**[421] observed that *"the pre-existing statutory provision may sometimes provide helpful guidance as to the interpretation of a subsequent amending provision, since it can often indicate the state of the law which it is intended to alter and suggest a rationale for the amendment, which may in turn assist in its interpretation."* That logic implies that the pre-existing statutory provision may also provide helpful guidance as to the interpretation of a subsequent provision, not amending it, but repeating it – in other words, the Barras Principle. As applied to this case it implies that the interpretation given to S.26 of the 1963 Act at very least helps in interpreting S.34(1) PDA 2000.

301. Perhaps closer to the present case was **Clinton**,[422] considered above and also cited by Dodd.[423] The issue there was the interpretation of restrictions on the general right of appeal from High Court imposed by S.50(4)(f) PDA 2000. Since the relevant date for interpretation purposes, S.50 had been replaced and S.50A added to the PDA 2000. As to S.50A Denham J said *"… the section does not apply to this case. Nor would I construe s 50 …. by reference to this new section."* However, that is all that is said on the issue, and it is very clear that the decision turned primarily on other and weighty issues as to the constitutional status of the right of appeal to the Supreme Court and other techniques of statutory interpretation – especially as to the use by the Oireachtas of a formula of words well-understood from use in other statutes.

302. I have considered Shadowmill's submissions that the absence of an express power to part-grant a permission from the list of potential planning conditions set out in S.34(4) PDA 2000 is "*instructive*". Whatever might be the position had I not interpreted S.34(1) as including such a power, given I have done so, little might now seem to turn on Shadowmill's point. But for the avoidance of doubt and given my interpretation of S.34(1) as including such a power, it seems to me that S.34(4) does not render objectionable a planning condition requiring the omission of part of a proposed development, such as was imposed in this case. The list of potential planning conditions set out in S.34(4) PDA is explicitly without prejudice to the generality of the power under S.34(1) to impose conditions and is a non-exclusive list – **Ashbourne Holdings**[424] and **Weston**.[425]

417 Revenue Commissioners v Droog [2016] IESC 55 §5.1.
418 Cronin (Inspector of Taxes) v. Cork and County Property Company Limited [1986] I.R. 559.
419 Cassidy v Commissioner of Gardai [2014] IEHC 386.
420 Bookfinders Ltd v. Revenue Commissioners [2020] IESC 60 (Supreme Court, O'Donnell J, 29 September 2020). §85 et seq.
421 Bookfinders Ltd v. Revenue Commissioners [2020] IESC 60 (Supreme Court, O'Donnell J, 29 September 2020).
422 Clinton v An Bord Pleanála, Dublin City Council and ors [2007] 1 IR 272; [2006] IESC 58. Clinton is also notable for Fennelly J's rejection of implying content into s.50 when "It would have been very easy for the Oireachtas to specify that the appeal was limited to that point. The legislature has chosen not to do so." – though, again, that was not the main focus of his reasoning."
423 §4.34.
424 Ashbourne Holdings v An Bord Pleanála and Cork County Council [2003] 2 IR 114. Hardiman J, referring to the 1963 Act, said "There is no doubt that the general words of s. 26(1) would permit the imposition of an otherwise proper condition even if it were outside the scope of any of the subparas. of s. 26(2). That is the effect of the "without prejudice" provision."
425 All considered below.

303. Even if I am wrong as to an implied power in S.34(1) of partial grant of permission, there is in S.34(1) an express power to grant permission subject to conditions and it seems to me established by **Kent County Council**,[426] **Wheatcroft**[427] and **Abenglen**[428] that a condition requiring the omission of part of the development for which application was made is within the scope of that express power to impose planning conditions. Such a view seems to me also consistent with the generality of the power to impose planning conditions recognised in Ashbourne Holdings and Weston.

304. Ashbourne Holding and Weston establish that, as a general proposition, a planning condition, other than one of a kind listed in S.34(4) PDA,[429] is valid if it rationally accords with stated objectives of proper planning and sustainable development and fairly and reasonably relates to the permitted development. The Inspector's report as to Block B, state her reasons for recommending refusal - including that the proposed development would be[430] "*visually overbearing and intrusive and would seriously injure the residential amenities of*" adjacent residents and would be "*development on a constrained site in close proximity to boundaries and reliant on extensively enclosed terraces and balconies would not provide for an adequate standard of development with regard to access to light and amenities and would therefore seriously injure the residential amenities of future occupants*". Reading the Impugned Decision as a whole, the Board's adoption of those reasons as reasons for its refusal of Block B amply demonstrate that the Board, in its proper planning judgment, regarded the omission of Block B as consistent with the proper planning and sustainable development of the area for the reason it gave in Condition 2 – namely *"In the interests of visual and residential amenity."*

305. In light of the foregoing, I respectfully reject Ground 3.1 as to the alleged lack of jurisdiction to omit Block B and hold the impugned Condition 2 valid as to the omission of Block B.

3.2 - Landscaping the Void - Pleadings & Arguments

306. §§21 & 22 of the Grounds plead that Condition 2 is ultra vires the Board and/or void for uncertainty.[431] Shadowmill says that, beyond the allegedly inadequate word "*landscaping*", Condition 2 is silent as to what has been granted permission. Landscaping in the curtilage of a house is ordinarily exempted development.[432] But by **S.57(1) PDA 2000** landscaping in the curtilage of a protected structure is exempted only if it would not materially affect the character of the structure

426 The judge observed, as to a condition he upheld, that "There is one further way of looking at the first respondent's decision. Not only did he expressly refuse permission for the construction of the access road but he also imposed a condition which had the same effect .."
427 Part of the ratio of which was that there was no principle of law that prevented the imposition on a planning permission of conditions that would have the effect of reducing the permitted development below that for which permission had been sought.
428 In which the condition upheld substantially reduced the area allowed for office use as compared with the area proposed for that use in the prosecutors' application for development permission.
429 To which the internal criteria of S.34(4) PDA apply.
430 The report says, "could be" but clearly means "would be".
431 §21.
432 Article 6 & Schedule 2 Part 1 Class 6(a) PDR 2001.

or any elements of it which contribute to its special interest. Landscaping in the curtilage of a protected structure which would have such an effect requires planning permission.

307. §22 of the Grounds pleads that:

> *"… the Board has no jurisdiction to grant planning permission for a proposed development … where a significant element of that permission has not been defined and/or in respect of which there is no provision for further public participation. This is particularly acute in the context of a Protected Structure where, as … the curtilage forms part of that structure. …. the granting of permission for "Landscaping" is furthermore inconsistent with the Board's obligation to have regard to the Architectural Heritage Protection Guidelines for Planning Authorities, Chapter 13 as required by s.28 of the Planning and Development Act 2000."*

308. The Board says, correctly, that Shadowmill's assertion that the granting of permission for "Landscaping" is inconsistent with the Board's obligation to have regard to the Architectural Heritage Protection Guidelines, is an undeveloped mere assertion. Logically, it also implies a non-existent duty to comply with those guidelines. I reject the assertion.

309. Shadowmill cites **Boland** and **Krikke** as to the parameters within which planning conditions may leave matters to further agreement. I address those decisions below. The Opposition by the Board and Lilacstone is essentially a traverse.

3.2 - Landscaping the Void - Validity of Conditions for further Agreement – & Caselaw

310. To set the context, it is fair to say that permission applications for apartment blocks or the like now invariably include landscaping proposals – in greater or lesser, but generally significant, detail. A failure to include such proposals could equally invariably be expected to prompt, where permissible, a request for further information by the planning decision-maker. And **S.34(4)(e) PDA 2000** empowers the Board to impose planning conditions *"requiring the planting, maintenance and replacement of trees, shrubs or other plants or the landscaping of structures or other land".*

Ashbourne Holdings Boland & Krikke

311. As to the power to impose conditions generally, Hardiman J in **Ashbourne Holdings**[433] considered s.26 of the 1963 Act, the predecessor of S.34 PDA 2000[434]. He held as follows:

- "*The structure of s.26, then, is that a general power to impose conditions is subject to a general restriction. This, insofar as relevant here, is to consider only the proper planning and development of the area and in doing so to have regard to the matters set out in s.26(2)*."
- Any condition falling within the subject-matter of a S.26(2) list entry must comply with the terms of that entry.
- "*There is no doubt that the general words of s.26(1)[435] would permit the imposition of an otherwise proper condition even if it were outside the scope of any of the subparas. of s. 26(2)[436]. That is the effect of the "without prejudice" provision*."

Hardiman cited Departmental Guidelines, though not *"legally authoritative",* as, *"a reasonable commonsense view of s. 26"* to the effect that a condition must,

- serve some genuine planning purpose in relation to the development permitted.
- be directed at securing the object for which the powers of the Act were given.
- fairly and reasonably relate to the permitted development.

The Guidelines said that the basic considerations in deciding whether to impose a condition are whether it is necessary, relevant to planning, relevant to the permitted development, enforceable, precise, and reasonable.

312. In **Boland**[437] the Supreme Court (Hamilton CJ) allowed for planning conditions leaving details to agreement with the planning authority - identifying the applicable principles as follows:

> *"In imposing conditions of this nature, the Board is obliged to set forth the purpose of such details, the overall objective to be achieved by the matters which have been left for such agreement, to state clearly the reasons therefor and to lay down criteria by which the developer and the planning authority can reach agreement."*[438]
>
> *"In imposing a condition that a matter be left to be agreed between the developer and the planning authority, the Board is entitled to have regard to:*
>
> *(a) the desirability of leaving to a developer who is hoping to engage in a complex enterprise a certain limited degree of flexibility having regard to the nature of the enterprise;*
>
> *(b) the desirability of leaving technical matters or matters of detail to be agreed between the developer and the planning authority, particularly when such matters or such details are*

433 Ashbourne Holdings Ltd v An Bord Pleanála [2003] 2 IR 114 – dealing with S.26 of the Local Government (Planning and Development) Act 1963 – the equivalent of S.34 PDA 2000.
434 Though Ashbourne was decided after the PDA 2000 was passed.
435 For which now read S.34(1) PDA 2000.
436 For which now read S.34(4) PDA 2000.
437 Boland v An Bord Pleanála [1996] 3 IR 435. Judgments by Hamilton CJ and Blayney J. Barrington J agreed with both.
438 §6.

within the responsibility of the planning authority and may require re-design in the light of the practical experience;

(c) the impracticability of imposing detailed conditions having regard to the nature of the development;

(d) the functions and responsibilities of the planning authority;

(e) whether the matters essentially are concerned with off-site problems and do not affect the subject lands;

(f) whether the enforcement of such conditions requires monitoring or supervision."[439]

It is also notable that Hamilton CJ adopted the view[440] that *"the extent to which flexibility or uncertainty is permissible in a planning permission is largely a matter of degree;"*

Blayney J. added a criterion whether a member of the public could have reasonable grounds for objecting to the work to be carried out pursuant to the condition, having regard to the precise nature of the instructions in regard to it laid down by the Board, and having regard to the fact that the details of the work have to be agreed by the planning authority.

It will be noted that Boland listed matters to which "*the Board is entitled to have regard*" rather than a prescriptive list of criteria. That said, the list has acquired very considerable authority since 1996. For convenience, I will refer to such conditions for further agreement as "Boland conditions".

313. **S.34(5) PDA 2000** gives effect to Boland in that it explicitly authorises conditions leaving "*points of detail*" over for agreement with the Planning Authority. It is not limited to "*complex enterprise(s)*", and it is fair to say that, as practice and caselaw had developed, neither has the use of Boland conditions so been limited.

314. Shadowmill cites the Court of Appeal in **Krikke**[441] which pithily summarises Boland as having:

" …. identified the matters to which the Board/planning authority is entitled to have regard in imposing conditions to be agreed with the planning authority. The purpose of the conditions is to permit a degree of flexibility having regard, inter alia, to the nature of the enterprise and technical matters that may require redesign in the light of practical experience. According to the principles, in imposing these conditions, the Board/planning authority is obliged to set forth for the purpose of such details, the overall objective to be achieved by the matters which have been

439 §5.
440 Of Murphy J. in Houlihan v. An Bord Pleanála (Unreported, High Court, Murphy J., 4th October, 1993). This observation is cited by Simons on Planning Law, (3rd Ed'n) (Browne) §3.392.
441 Krikke v. Barranafaddock Sustainable Electricity Ltd [2021] IECA 217 (Court of Appeal (civil), Donnelly J, 30 July 2021) §59.

left for such agreement; to state clearly the reasons therefore and lay down criteria by which the developer and the planning authority can reach agreement."

315. By reference to this summary in Krikke, Shadowmill says:

- Condition 2 was not imposed to allow a degree of *ex post facto* technical flexibility by reference to the *"nature of the enterprise and technical matters that may require redesign in light of practical experience".* It was imposed because the Board omitted Block B as it would have a significant adverse effect on the residential amenity of future occupants.

- Condition 2 is completely silent on significant questions of how the area should be landscaped[442] - in respect of which the public are entitled to be legitimately concerned: will the public be allowed access the space? Will the use of the space generate significant noise or other nuisance? They assert that *"landscaping"* is not merely a technical matter of detail on which public participation is unnecessary.
    - I can say now, to dispose of these criticisms, that there is no reason to believe or suggest that landscaping and public access are necessarily coterminous or even linked. Indeed, generally they are not. The enquiry as to noise or other nuisance is entirely speculative and, in the unlikely event of nuisance by landscaping, anyone affected would have a remedy in tort. I do not consider either supposed uncertainty as relevant to present concerns.

Kenny

316. In **Kenny**[443] as to the vires to impose planning conditions and citing **Boland**,[444] McKechnie J stated:-

> *"(i) An Bord Pleanála is entitled to grant a planning permission subject to conditions which may include a requirement that matters should be agreed between the planning authority and the recipient of the permission.*
>
> *(ii) Whether such a requirement is intra vires is a matter of degree and depends on the nature of the matter left for resolution, the resolving of which must have regard to the nature and circumstances of each particular application and development.*

442 Shadowmill says the Board did not, for example, stipulate whether the area should be public open space, private open space or communal open space. It did not stipulate whether it should be landscaped as a play area or not and if so for what demographic.
443 Kenny v An Bord Pleanála & Ors [2001] 1 I.R. 565, §9.
Mr Kenny impugned a Board decision, of which Condition 8 required the submission of revised drawings of the development for agreement with the Planning Authority. Inter alia, he impugned that Condition as ultra vires in leaving the developer and the planning authority is at large, as to the agreement in private and without public participation of the appearance, nature and scale of the ultimate development. He said that thereby what was granted was permission for an unknown development. McKechnie J rejected that challenge – essentially as failing to read Condition 8 as part of the permission as a whole, including Condition 1 which required the development to be carried out in accordance with revised plans which had already been submitted to the planning authority. Read in context of the inspector's report Condition 8 was directed at correction of certain identified discrepancies and ambiguities in the drawings already submitted.
444 Boland v. An Bord Pleanála [1996] 3 I.R. 435.

(iii) In deciding whether or not to regulate an aspect of a proposed development in this way the board is entitled

(a) To afford a developer, subject to the consent of the planning authority, a degree of flexibility, particularly if the intended scheme involves complex enterprise;

(b) To leave technical matters, or matters of detail including a redesign in the light of practical experience, to such a device; and

(c) To have faith and confidence in the planning authority's role given its statutory function and responsibility."

317. As to the last of these factors, McKechnie J said,

"I do not believe that it would be correct of me to assume that the planning authority, which as a matter of law ought to be aware of its functions and responsibilities including its limitations, when dealing with conditions of this nature, would exceed its role which is to further the faithful, true and core implementation of the permission. It would be wrong in my view to ascribe to it any ultra vires intention when none has or could be so identified."[445]

Donnelly, Dooner & O'Connor

318. The Board cites **Donnelly**[446] as an example of landscaping left as detail to further agreement with the Council, in which Barr J upheld the Boland condition in the face of an argument that it was impermissible where the development could have an adverse effect on a European site. Of some significance, Barr J invoked the principle that the permission, including the Boland condition, *"must be read in light of the planning documentation and the inspector's report"* and caselaw to the effect that agreements pursuant to Boland Conditions were not invalid for want of public participation as, if they exceeded the vires of the condition, they could be quashed on judicial review. Barr J held that *"the issue of landscaping has been sufficiently set out in the planning documentation, such that the developer and the planning authority are not free to ignore the general parameters that have already been set down and accepted as part of the permission."* While the facts here are somewhat different, in my view the analogy with Donnelly is persuasive.

319. Lilacstone cites **Dooner**[447] which both recites the Boland list set out above and cites **O'Connor**[448] as to the validity of an agreement (commonly termed a "compliance agreement") between a planning authority and a developer as to matters left, by a Boland condition, to their

445 §14.
446 Donnelly v An Bord Pleanála & Cavan County Council [2021] IEHC 834.
447 Dooner v Longford County Council [2009] 4 IR 619. §13 et seq.
448 O'Connor v Dublin Corporation & Borg Developments (Unreported, High Court, O' Neill J, 3rd October, 2000).

agreement. Ms O'Connor alleged that the agreement made in that case was not a faithful implementation of the Boland conditions. O'Neill J held in O'Connor that the test of the validity of such an agreement is not whether it is irrational but is whether it is correct in law, is intra vires – i.e. lies within the scope of the power conferred by the Board's condition.[449]

320. O'Neill J held that, for an alteration in the permitted development to come within a Boland condition requiring clarification and agreement with the planning authority of the external layout, form and appearance of the proposed development, *"such degree of change would have to be of a very limited and technical nature and not such as to excite significant public interest and/or objection."* O'Neill J held that the planning authority's power of agreement under such a condition *"is a very limited one and of a ministerial nature. What they have to do is to implement that which has already been decided in essence."*

321. Dooner likewise, was a question whether a compliance agreement was intra vires the relevant Boland condition. This required, first, interpretation of the condition by reference to the "*limited degree of flexibility*" permissible. On the facts, the proposed alterations[450] were held substantial and outside the permissible limited degree of flexibility, such that the planning authority's agreement to them was quashed as ultra vires. Lilacstone cites **Dooner** for the proposition that Condition 2 permits only simple landscaping as a matter of detail within the limited flexibility permissible, such that it should not, to borrow from O'Neill J in O'Connor, "*excite significant public interest and/or objection."*

3.2 - Landscaping the Void - Discussion & Conclusion

322. It will be remembered that Condition 2 provided, as to the site of the omitted Block B, that:

> *"… the area shall be landscaped in accordance with a comprehensive boundary treatment and landscaping scheme which shall be submitted to and agreed in writing with the planning authority, prior to commencement of development."*

323. S.34(4)(e) PDA 2000 allows the imposition of landscaping conditions. So, it is unnecessary to rely on Ashbourne to validate Condition 2 in principle. But the Ashbourne decision usefully elucidates what can be expected by way of the purpose of a condition. Explicitly, Condition 2 imposes a positive obligation to landscape these lands if development proceeds on foot of the permission. If that occurs, the landscaping will be done as development explicitly permitted by the Impugned Permission. It will not be done as exempted development – even if the substance of those works, if done other than pursuant to a planning permission, would have been exempted development. This seems to me the correct analysis and, in any event, to follow from **O'Connor**.

449 O'Keeffe v An Bord Pleanála [1993] 1 IR 39.
450 McGovern J considered that the moving of the main building by 14.5 metres was substantial having regard to the nature of the site.

324. Shadowmill is not quite correct in its unqualified submission that landscaping in the curtilage of a house, being a protected structure, is not exempted development. Landscaping in the curtilage of a house, not being a protected structure, is exempted development.[451] Assuming Shadowmill correct in asserting that S.57 PDA 2000 restricts the application of exempted development status to landscaping in the curtilage of a protected structure, S.57 renders it not exempted if it *"would not materially affect the character of— (a) the structure, or (b) any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest."* If the works would not have such an effect, they remain exempted.

325. Lilacstone correctly accepts that a Boland condition cannot authorise development beyond that permitted by the permission in which the condition is found. Lilacstone suggests that cases such as Dooner and Kenny imply that Condition 2 permits only landscaping which would be exempted development. I do not think it helps to import the concept of exempted development, at least as a formal limitation, into the scope of works permissible pursuant to a Boland condition. In acting on a permission, a developer is carrying out permitted development, not exempted development. Many, if not most, planning permissions will contemplate and permit works as part of the permitted development which, if done discretely and not in reliance on a permission, would be exempted development. But, as part of the presumptively coherent whole of a permitted development, they are permitted works to which the developer is committed if it acts on the permission and by the scope of which the developer is constrained. O'Neill J in O'Connor seemed to think likewise in rejecting a proposition that:

> *"… because the rearrangement of the internal structure of blocks E and F could be said to be an exempt development, that is its permissible at this stage in advance of the construction of blocks E and F in compliance with the planning permission to disregard the internal structures in respect of which planning permission was obtained and to carry out the development in the first instance in this rearranged fashion. In my opinion were it open to a developer to do that, it would make nonsense of planning permission in respect of internal structures, as it would be open to a developer to make such alterations as he pleased not withstanding the plans and specifications in respect of which planning permission had been obtained. Thus the planning code would be confined solely to exterior structures. This of course cannot be, and I have no doubt that Mr. O'Neill is incorrect in this submission."*

326. Whatever landscaping can be agreed under Condition 2 is development for which permission has been granted, as a condition of permission for the wider development permitted. That is what Condition 2 provides. The effect of Condition 2 is that, if the Impugned Permission is activated by development on foot thereof, the landscaping agreed under Condition 2 before commencement of development must be carried into effect.

451 Article 6 & Schedule 2 Part 1 Class 6(a) PDR 2001.

327. I think it better not to import the concept of exempted development as in law formally limiting what works are permissible under a Boland condition for further agreement – though reference to exempted development by analogy could well be useful. In my view, the concept of exempted development does not govern the scope of works to which the Council may agree pursuant to a Boland condition. That said, there is nothing unusual about such agreement allowing, as part of a greater permitted development, development which – if done on a stand-alone basis – would be exempted. The concepts of exempted development and points of detail are not dissimilar - though not necessarily coterminous. Analogising examples of the former to the latter may be useful in a given case. Landscaping itself is a good example of a form of development which could be either, depending on circumstance.

328. Analogy apart and as to identifying the applicable law, I prefer to simply apply Boland, Kenny and O'Connor to the effect that the "*limited degree of flexibility*" is only as to "*technical matters and matters of detail*" and "*to implement that which has already been decided in essence"* - not being *"such as to excite significant public interest and/or objection."* And McKechnie J in Kenny was speaking of the validity of the condition but also of the validity of an agreement made under it when he said: "*Whether such a requirement is intra vires is a matter of degree and depends on the nature of the matter left for resolution, the resolving of which must have regard to the nature and circumstances of each particular application and development."*

329. In my view, Lilacstone is correct in submitting that the observation by McKechnie J in Kenny cited above, as to faith and confidence in planning authorities, applies in the present case. The Court must trust and assume that, in agreeing landscaping works, the Council will stay within its vires as limited by Condition 2 and as limited more generally by the Impugned Permission of which it forms part and in which context it must be interpreted.

330. The Board did suggest (perhaps at my prompting[452]) that the interposition of Block A between Stone Villa and the Void will mean that the Void will no longer be in the curtilage of Stone Villa. As, perhaps wisely taken in the round, Lilacstone did not argue for such an interpretation of the effect of the permission I will not decide that point. So the Council, in considering agreement on foot of Condition 2 and the limitation on the scope of landscaping which can be agreed to that which complies with the limits of the flexibility allowed, will treat the Void as part of the curtilage of Stone Villa and will consider the necessity to avoid material effect on Stone Villa as a protected structure. That said, the interposition of Block A seems likely, as a practical matter, to diminish the risk of such material effect.

331. It also seems to me that, as proper planning and sustainable development (perhaps especially in the curtilage of a protected structure, but in any event) necessitates coherent

452 Day 2 p130.

development, the Council will, in deciding whether and in what terms to agree under Condition 2 a landscaping scheme for the Void, consider the issue of coherence with:

- the permitted interposition of Block A between Stone Villa and the Void.
- the landscaping scheme approved for the Site generally by way of the Impugned Permission and following public consultation.
- the designation by the Impugned Permission of area around the Void as public open space.[453]

Interpreting the Impugned Permission as coherent whole, it supplies adequate certainty to Condition 2 by providing a landscaping context in which Agreement pursuant to Condition 2 is to be made. Though I accept that present circumstances are not on all fours with those in Donnelly, nonetheless my view seems to me consistent with the ratio of **Donnelly** in which, as here, a detailed landscaping proposal submitted with the planning application and informed the interpretation of the permission as granted and set the general parameters which the Council there, as here, were "not free to ignore".

332. The planning application proposed 788m^2 of public open space to the front and side of Stone Villa and Block A and to the side and rear of Block B – the latter area comprising 200m^2.[454] In their appeal[455] Lilacstone proposed a revision which would redesignate the space to the side and rear of Block B as communal open space – for the avoidance of doubt, this was proposed not merely for Option B but as a revision of the originally proposed development. However Condition 1 of the Impugned Permission requires development in accordance with the "*plans and particulars lodged with the application*".[456] As the issue was not argued, I will not determine any question of interpretation of the Impugned Permission in this regard. But one way or the other, the land generally north of the Void and around the northern part of the Void will be open space – whether public or communal. While that fact will inform the Council's attitude to a landscaping agreement for purposes of Condition 2 (which is not to suggest that the Council will be entitled to require that the Void be public space), I do not think any distinction between public and communal open space to the north of the Void suffices to impugn the certainty of the Condition 2 as to landscaping. While I do not consider that it affects the validity of the permission, this consideration again illustrates that a request for revised plans, which would have prompted attention to these areas, would have been prudent.

333. I respectfully agree with McKechnie J in Kenny that whether a condition letting matters to agreement between the developer and the planning authority, and the resultant agreement, are intra vires is a matter of degree. It depends on the nature of the matter left for resolution, the resolving of which must have regard to the nature and circumstances of each particular application and development.

453 See DCC Planner's Report 24/1/20, p8 sub heading "Proposed Development". Thornton O'Connor Planning Report for Lilacstone to the Board §6.6.
454 See DCC Planner's Report 24/1/20, p8 subheading "Proposed Development". Thornton O'Connor Planning Report for Lilacstone to the Board §6.6.
455 Thornton O'Connor 19/2/20 §4.1.
456 Save as the planning conditions otherwise require – but no conditions affect the identification of public and communal open space.

334. In my view, while Condition 2 as to landscaping could – preferably should – have been more particular in its terms, it falls to be interpreted as part of the Impugned Permission as a whole and on the basis, put generally, of coherence with the Impugned Permission as a whole. As McKechnie J said in **Kenny**, it is appropriate to have "*faith and confidence in the planning authority's role"* "*which is to further the faithful, true and core implementation of the permission".* Interpretation of Condition 2 in that way rescues Condition 2 from uncertainty as the Council has ample information in the permission as to landscaping of the Site, to which it will have regard in making an agreement for purposes of Condition 2 which does not offend as to effect on a protected structure.

335. While the facts of this case may perhaps stretch that principle somewhat, the principle itself can be illustrated by the absurdity of quashing a permission because such a landscaping condition applies to a void left by omitting, say, two houses of a large housing estate. This approach seems to me to accord with the commonsense and pragmatic interpretation of a planning decision as a whole espoused by Simons J in **Ardragh Wind Farm**.[457] And **Simons**[458] cites **Irish Asphalt**[459] for a *"pragmatic approach to the interpretation of conditions" – "it seems that a condition will only be void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous."* Costello J in **Irish Asphalt** cited for this proposition Lord Denning in **Fawcett**[460] - he was concerned with a planning condition but was more generally, robustly and at some length, of the view that ambiguities are to be resolved.

336. For the avoidance of doubt, as the issue was mentioned by counsel for Lilacstone, though not pressed, it does not seem to me that the agreement to be reached by the Council and Lilacstone pursuant to Condition 2, as to the landscaping of the area left vacant by the omission of Block B, should be in any degree informed by any possibility or intimation of further development of that area on foot of a further planning application. It is an unavoidable inference that, pursuant to Condition 2 of the Impugned Permission, the Void is to be open space. That follows from the requirement to landscape it. The landscaping agreement with the Council must be appropriate to the single and unified overall development permitted by the Impugned Permission and be confined to the faithful implementation of that permission. Any further planning application will be decided in due course on its own merits and does not fall in the present planning process to be either foreseen or considered, much less prejudged in any agreement pursuant to Condition 2. For the avoidance of doubt, that is an entirely neutral observation as to the prospects of any such further planning application.

337. In my view Condition 2 as to landscaping the Void is neither void for uncertainty nor ultra vires, when properly understood in the context of the permission as a whole and as limited to

457 E.g. Ardragh Wind Farm Ltd v. An Bord Pleanála [2019] IEHC 795 (High Court, Simons J, 22 November 2019). See also Camiveo Ltd v. Dunnes Stores [2019] IECA 138 (Court of Appeal, Costello J, 9 May 2019).
458 Simons on Planning Law (3rd Ed'n) (Browne) §4–237.
459 Irish Asphalt Ltd v An Bord Pleanála, unreported, High Court, Costello J., 28 July 1995; [1995] Lexis Citation 5682.
460 Fawcett v Buckingham Co Ltd [1960] 3 All ER 503: "It is the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or to put up with them. And this applies to conditions in planning permissions as well as to other documents."

agreement regarding landscaping works which would generally accord with the decisions in Boland, Kenny and O'Connor and specifically would not materially affect the protected structure. Accordingly I refuse relief in this regard.

GROUND 4[461] - PROTECTED STRUCTURE - CONDITION 6

4 - Introduction

338. The Goodbody Conservation Report[462] records historical mapping showing the Site as first built on between 1811 and 1821. The DCC Conservation officers[463] say there is no sign of a building on the site on Wilson's Directory map of 1846.[464] Mr Goodbody says "Stone Villa" is first seen on the 1849 OS map.[465] An 1886 OS map showed it in greater detail.

339. As stated above, Stone Villa is a three-storey, three-bay, stone-faced, detached house with a two-storey rear return. The Goodbody Conservation Report describes it as having an "*air of significance*" - as *"an imposing house, though surprisingly modest in size."* The front door is now on the ground floor. While Mr Goodbody doesn't comment and, surprisingly, doesn't provide a good general photo of the front façade, the DCC Conservation officers[466] say that,

> *"The larger scale maps dating to 1886 and 1907 show steps to the front elevation in the position of the Edwardian porch. The horizontal proportions of the façade suggest that the house was originally entered at first floor level and that the ground floor originally served as a raised basement. Additionally the floor to ceiling heights at ground floor are significantly lower than the floor to ceiling heights at the upper floors and contain no decorative plasterwork, lending further weight to this suggestion."*

In fairness to Lilacstone, I should add that a general photo[467] of the front façade is found at Fig 2.4 of the Planning Report submitted with the planning application.

Protected Structures – Law Generally

340. The law on Protected Structures was recently addressed in **MRRA**.[468] That decision considered the interface between Protected Structures and EIA, but that issue does not arise here. Essentially, protection under Part IV Chapter 1 PDA 2000 is of "*architectural heritage*" and proceeds

461 Misnumbered as 5 in the Particulars in the grounds. The relevant particulars are at Ground §E(b)23 et seq.
462 See below.
463 Report considered below.
464 Conservation Officers' report.
465 Though the papers vary a little on the issue, it seems clear enough that Stone Villa is early/mid-Victorian rather than Regency.
466 Report considered below.
467 taken by Thornton O'Connor, Planning Consultants.
468 Monkstown Road Residents' Association v An Bord Pleanála [2022] IEHC 318.

from and affords formal statutory recognition and protection to "*special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest*". Its importance is reflected in the fact that by **S.51(1) PDA 2000** the Planning Authority must – as a matter of obligation - list as protected "*every*" structure in its functional area which, in its opinion, is of such "*special*" interest. A Protected Structure includes its curtilage.

341. Substantive protection takes, primarily, the following forms:

- By **S.57(1) PDA 2000** development which would otherwise fall into certain classes of exempted development[469] is not exempted unless it would not materially affect the "character" of the protected structure and, by **S.57(2) PDA 2000**, a declaration by the planning authority in that regard may be sought.
- By **S.57(10) PDA 2000,** in deciding a planning application or appeal regard must be had to the protected status of the structure.
- By **S.57(10) PDA 2000** planning permission to demolish a protected structure may issue only in exceptional circumstances.
- By **S.58 PDA 2000** owners and occupiers must ensure that protected structures are not endangered and by **Ss.59 & 60 PDA 2000** the planning authority can require them to perform preventive and restorative works accordingly. This seems notable in empowering planning authorities to require owners to expend monies on their properties. By **S.69 PDA 2000** the planning authority can itself perform such works. Again, this seems notable in its empowering planning authorities to effect works on private property the ownership of which is constitutionally protected.
- By **S.71 PDA 2000** the planning authority can compulsorily acquire a protected structure. This seems notable for similar reasons: while CPO powers are not uncommon their purposes must be constitutionally justifiable.
- By **S.10(2)(f) PDA 2000** Development Plans must include objectives for the protection of protected structures – as to which S.52 requires Ministerial Guidelines.

469 "Notwithstanding section 4(1)(a), (h), (i), F480[(ia)] (j), (k), or (l) and any regulations made under section 4(2), …"
S.4. in part reads: —(1) The following shall be exempted developments for the purposes of this Act—
(a) development consisting of the use of any land for the purpose of agriculture and development consisting of the use for that purpose of any building occupied together with land so used;
(h) development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures;
(i) development consisting of the thinning, felling or replanting of trees, forests or woodlands or works ancillary to that development, but not including the replacement of broadleaf high forest by conifer species;]
F49[(ia) development (other than development consisting of the provision of access to a national road within the meaning of the Roads Act 1993) that consists of—
(I) the construction, maintenance or improvement of a road (other than a public road) that serves a forest or woodland, or
(II) works ancillary to such construction, maintenance or improvement;]
(j) development consisting of the use of any structure or other land within the curtilage of a house for any purpose incidental to the enjoyment of the house as such;
(k) development consisting of the use of land for the purposes of a casual trading area (within the meaning of the Casual Trading Act, 1995);
(l) development consisting of the carrying out of any of the works referred to in the Land Reclamation Act, 1949, not being works comprised in the fencing or enclosure of land which has been open to or used by the public within the ten years preceding the date on which the works are commenced or works consisting of land reclamation or reclamation of estuarine marsh land and of callows, referred to in section 2 of that Act.
(2) (a) The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that—

342. As to **S.57(1) PDA 2000** and the issue of exempted development, and though overturned on other issues,[470] the judgment of Barrett J in **Moore**[471] seems correct in citing the Supreme Court in **Cairnduff**,[472] as illuminating the meaning of the "*character*" of a protected structure. In Cairnduff the character of a structure was considered to relate to its shape, colour, design, ornamental features and layout, rather than to its use.

343. Demolition apart, there is no prohibition on planning permissions to develop a protected structure. The planning decision-maker is obliged to "*have regard*" to its protected status. However, this seems an instance in which the particular meaning of "*have regard*" falls to be considered as text in the context of the scheme of the PDA 2000 as to protected structures. It is important to say that the phrase "*have regard to*" is well-known and understood in its use in planning and other statutes. It will, in the very great majority of cases, be interpreted accordingly as imposing a light burden on the decision-maker. But it does not seem to me that the phrase can have an inviolable or talismanic meaning of universal application, immunised from interpretation in accordance with the important rule of statutory interpretation that text must be interpreted in context.[473] **CIE v An Bord Pleanála**[474] (in which the Board defended its declaration under S.5 PDA 2000 that certain development of a protected structure was not exempted development) is important to the effect that Clarke J held that "*counsel for the Board was correct when stating that the legislation, taken as a whole, provides for a very significant support for protected structures."* The degree of that protection is emphasised when one notes that Counsel for the Board's "*correct*" submission, had been that the scheme was intended to "*ensure*" "*a high degree of protection*". Clarke J also referred to "*a wide degree of protection*". For good measure, Humphreys J in **Sherwin**[475] observed that what is required by the Act is "*actual*" protection – the intention of the Act is "*clearly to minimise*" adverse impacts. Ceteris paribus, the level of protection mandated cannot, it seems to me, vary depending on whether the Board is dealing with a S.5 application for a declaration or a planning application.

344. That said, all things may often not be equal and countervailing considerations may be more or less weighty in a given case – once protected status is carefully considered, as seems to me to be required by the high, wide and very significant degree of protection identified by Clarke J.

345. In a remark which seems generally applicable to the protection of Protected Structures, Humphreys J in **Sherwin** recently observed that it deserved *"appropriate recognition"* that *"normally the best way to protect a structure is to keep it in use; preferably the original use or if not a closely related one, or failing that some appropriate new use".* While Humphreys J clearly acknowledged that such would not always be the case, in light of his view, the view that restoration of the derelict Stone Villa to active residential use is in principle acceptable is not merely unsurprising – it is one to which,

470 [2018] 3 IR 265.
471 Moore V The Minister For Arts, Heritage And The Gaelteacht & Chartered Land Limited [2016] IEHC 150.
472 Cairnduff v. O'Connell [1986] I.R. 73.
473 As to the interpretation of the phrase "have regard to" in context, see for example the decision of the Federal Court of Australia in Minister for Immigration and Citizenship v Khadgi [2010] FCAFC 145 and of the Queen's Bench in R(Harris) v Environment Agency [2022] EWHC 2264, [2022] PTSR 1751.
474 Córas Iompair Éireann and Another v An Bord Pleanála and Another [2008] IEHC 295.
475 Sherwin v. An Bord Pleanála [2023] IEHC 26 (High Court (Judicial Review), Humphreys J, 27 January 2023).

clearly, considerable weight could properly be given. All parties to these proceedings essentially agree.

346. Humphreys J in **Sherwin** assisted on the effect of S.57(10) PDA 2000 in its prohibition of permission for demolition of protected structures save in exceptional circumstances. He held that the protection of S.57(10) PDA 2000 extends to partial and to internal demolition if it detrimentally affects the "*interest*" for the protection of which the structure was added to the list of protected structures. Further, while giving appropriate weight to the retention or restoration of the structure to use is required, he saw S.57(10) PDA 2000 as applying, where an "*individual piece of demolition*" is part of the scheme to retain or restore the structure to use.

> *"Thus there will be a category of instances where the exceptionality test can be satisfied by reason of any relatively modest partial demolitions being the minimum necessary to achieve the overall protection of the structure by retaining it in use. That is not a bulldozer's charter, because it involves starting from a premise of protection and looking for the minimum deviation from that, rather than what seems to me to be the inspector and board's essential de facto approach here of starting from the developer's scheme and proposing only minimal changes to that to mitigate the worst impacts."*

347. Humphreys J says that the approach to demolition (full or partial) required by S.57(10) "*must be that the benefit to the structure of any given development (for example by retaining continued use) must outweigh such detriments, which should be the minimum necessary to achieve the benefit concerned."* He saw the "*basic approach*" of the Architectural Heritage Guidelines 2011[476] as consistent with his interpretation of S.57(10) in their statement that the onus is on the applicant for permission for partial demolition of a protected structure to make a case that the part to be demolished does not contribute to the special interest of the whole, or that the demolition is essential to the proposed development and will allow for the proper conservation of the whole structure. What is required is a

> *"…. careful assessment of material contravention and exceptional circumstances …. to identify the benefits to the protected structure (for example, its continued use) as against the detriments, and be satisfied that any detriments were the minimum necessary to achieve protection of the structure. It is very difficult to discern in the inspector's report any meaningful engagement with the need to minimise impacts on the protected structures as a result of this relatively ambitious development."*
>
> *"The decision-maker should[477] first identify all potential impacts on the protected structures, and then critically examine each of them to see whether they are the minimum necessary in order to achieve any overall benefit to the protected structure by reason of retaining it in use."*

476 §6.8.13.
477 Humphreys J clearly used the word "should" in the sense of "must" – which is not unusual.

> *"In one sense I agree with the inspector that speaking loosely and non-legalistically, there is a balance to be achieved between various factors when it comes to developments affecting protected structures. But we only get to that point having first surmounted any legal hurdles. Before any planning judgements, one must first comply with all legal requirements. Those include …. compliance with the statutory system of protection of "protected structures", particularly section 57(10) of the 2000 Act."*

348. Of course, Humphreys J was considering demolition. Nonetheless, his invoking the requirement of critical examination by the Board is the invocation of a general obligation on the Board in its consideration of planning appeals.[478]

349. Sherwin raises potentially difficult issues as to where, in a given case, the demarcation may lie between partial demolition (internal or external) and alteration not amounting to demolition. That in turn emphasises the necessity of a description of the intended works adequate to consideration of that issue. However, as the decision in Sherwin post-dated argument in this case, I should say that I have not reverted to the parties for submissions with regard to it as I see Sherwin as merely fleshing out the high, wide and very significant degree of protection identified by Clarke J in the CIE case as required by the statutory scheme. I have decided the matter in light of the CIE case without reliance on Sherwin.

Protected Structures – PDR 2001

350. Planning applications must identify protected structures intended to be developed but, whatever the entirely proper and desirable practice of decision-makers and the requirements of Development Plans, the PDR 2001 sets certain additional requirements as to the information to be furnished as to proposed development of protected structures. They include the following pleaded obligations:

- **Article 23(1)(e) & (f) PDR 2001** require[479] that:
    - *"(e) plans relating to works comprising reconstruction, alteration or extension of a structure shall be so marked or coloured as to distinguish between the existing structure and the works proposed,*
    - *(f) plans and drawings of floor plans, elevations and sections shall indicate in figures the principal dimensions (including overall height) of any proposed structure and the site, and site*

478 See for example, Balz v. An Bord Pleanála [2019] IESC 90 (Supreme Court, O'Donnell J, 12 December 2019) §45; Concerned Residents of Treascon and Clondoolusk v. An Bord Pleanála [2022] IEHC 700 (High Court (Judicial Review), Humphreys J, 16 December 2022) §78; Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14 §410; Weston Ltd. v An Bord Pleanála [2010] IEHC 255, [2010] 7 JIC 0102 (Unreported, High Court, Charleton J., 1st July, 2010) §22; Environmental Trust Ireland v. An Bord Pleanála [2022] IEHC 540 (High Court (General), Holland J, 3 October 2022) §236.

479 Generally, as opposed to specifically, as relates to protected structures.

or layout plans shall indicate the distances of any such structure from the boundaries of the site."

- **Article 23(2) PDR 2001** requires that planning applications to develop protected structures shall, additionally, "*be accompanied by such photographs, plans and other particulars as are necessary to show how the development would affect the character of the structure*".[480]

For completeness, I would add that **Article 22(5) PDR 2001** provides that floor plans are not required of a structure proposed to be demolished – unless it is a protected structure.

4 - Goodbody Conservation Report - for Lilacstone

351. Mr Rob Goodbody, of Historic Building Consultants, prepared a Conservation Assessment[481] (the "Goodbody Conservation Report") which Lilacstone submitted with the Planning Application. He also swore two affidavits in the judicial review. I will address them later but should say now that, in his Affidavits, he identifies himself as a "*building conservation expert*" and establishes his expertise. It is notable, though no criticism of him, to observe that he is not a conservation architect. It is convenient also to note here that, while not explicitly mentioned in Mr Goodbody's report, amongst the exhibits are existing and proposed floor plans prepared by Lilacstone's architects and submitted in the planning application. They assist considerably in understanding his report.

352. I should interpose that counsel for the Board asserted[482] the existence of additional drawings about what is to happen to the internal structure, which show all the measures proposed - similar drawings to those one would see for normal development works. I was not referred to any but the floor plans and have found none such in the exhibits.

353. Mr Goodbody says that *"Stone Villa is in extremely poor condition and is in need of urgent attention and also needs to be brought back into use as quickly as possible*". It's fair to say, and entirely unsurprising, that everyone agrees.

354. Apparently by reason of that extremely poor condition *"access was only available to the staircase and the rooms at the front of the house. The remainder of the house, including the return, was not seen*." It is said that "*The north-eastern corner of the house appears to be three-storey, though no access was available*." The window opes are bricked up. No explanation is given as to why steps were not taken to make access available to these areas, even if only to elevated external inspection via opened up window opes or the like. I appreciate that health and safety concerns may

480 23(1)(d) PDR 2001 requires that elevations show the main features of any buildings within the curtilage of the protected structure which would be materially affected by the proposed development.
481 Dated 4 November 2019.
482 Day 3 p50.

arise, but I do not find this explanation convincing absent reasons why those concerns could not be overcome – as they will necessarily be overcome if and when development commences. Taken ad absurdum, such a rationale could absolve a planning applicant of any report on the condition of a protected structure if the entire was in advanced disrepair and/or access to it was entirely bricked up.

355. The photos and text make clear that the "*Roman Cement*" render on both gables and the rear elevation has extensively failed and collapsed, such that much of the underlying brick is exposed, likely resulting in damp penetration. As I have said, Mr Goodbody provides no useful photo of the front façade. That is especially notable as he records that front façade is of rough-faced limestone ashlar and "*is bowing out to a significant extent and is secured by steel bracing"*.[483] He says that it is not clear without further investigation whether this "*severe bowing*" is confined to the limestone ashlar cladding or whether the entire wall is bowing. The house is at present braced with steelwork, including horizontal members across the front elevation and framework supporting the staircase.

356. Mr Goodbody enters the caveat, significant not least given what he says of the bowing front façade, that, while his report comments on aspects of the condition of the building, "*it is not a condition report or a structural report and must not be read as such. All comments in the methodology are subject to verification by the architect or engineer and in the light of conditions as established on site."* No party referred me to an architect's or engineer's report nor is there any explanation why no structural survey was done to inform an understanding of the necessary conservation works.

357. Notably, Mr Goodbody states that the exterior needs "*serious intervention*". As to the bowing of the front façade and given the uncertainty of its cause, the report suggests that the methodology for these works be made the subject of a planning condition or addressed via a S.5 PDA 2000 declaration.[484] As I say, the absence of a structural report identifying the nature of the problem and its solution is unexplained. Mr Goodbody suggests that, as such works are clearly necessary, this issue is unlikely to determine the outcome of the planning application - so either approach[485] would not prejudice "*third-party interests*". The render will be made good with hydraulic lime-based NHL 5 render - ruled and lined to match existing. The façade will be repainted as before.

358. Mr Goodbody says that the Proposed Development will leave Stone Villa as a freestanding building, without addition to either side. As a result, the view of the house from the street frontage on North Circular Road will be respected and there will be minimal impact on its character and setting, in Mr Goodbody's view. While, given Block A is wider and higher in elevation than is Stone

483 Plate 5. of the Goodbody Conservation Report does show the bowing at a gable edge.
484 Presumably of exempted development.
485 i.e. Planning Condition or S.5 Declaration.

Villa,[486] that must be an arguable proposition, it is for the Board to decide, not the Court. Even if the effect is more than minimal, its acceptability is also for the Board to decide, not the Court.

359. The internal photos readily confirm the poor condition of the house, including damp. The ground floor photos are of the hall/stairs and front room only. There are no photos of the three rooms behind the front room. On the first floor, the piano nobile, only the main, front, room is depicted. Again, there are no photos of the three rooms behind the front room. The front, three-bay, room runs the width of the house. The three windows are set in moulded-timber architraves with panelled shutters but all windows in the house are later replacements and not in good condition. The room has a chimney breast at either end – though only one has a limestone mantlepiece with a later insert. The cornicing is plain, but the ceiling looks higher than the rooms above and below. To my inexpert eye, the overall impression is of some plain grandeur, but much-faded. The second-floor photos reveal more modest dimensions. There are no cornices in the entrance hall, the staircase or the second floor rooms. The staircase is likely is not the original – more likely late-19th- or early 20th-century. Albeit I am a layman, it is difficult to disagree with Mr Goodbody's view that *"The internal fittings and decorative features in the house are also of a relatively modest quality."*

360. The internal works proposed on each floor are summarised. Though some changes are described, the floor plans opened to me[487] show clearly that the existing layout will be generally preserved. Necessary fire stopping/fire-rated partitioning is described. The windows will be refurbished as far as possible. The methodology for closing some existing and opening some new doorways is described. It's apparent from the drawings and described in the report where new kitchens and bathrooms are required. The ground- and first-floor bathrooms will be in the rear return.

361. Mr Goodbody is of the view that generally, the works will have *"minimal impact on the character of the house, whether interior or exterior. For the most part the proposed works would be easily reversible."*

4 - Protected Structure - DCC Conservation Officers' Report, Inspector's Report & Condition 6

362. DCC had added Stone Villa to the list of protected structures. Though it's not clear exactly why, it seems[488] that it was added for its *"cultural and historical significance as it represents a 19th-century villa house-type, once common but now quite rare, on the outskirts of the city, regarded as the countryside until the beginning of the twentieth century. The survival of the house maintains the link with the early rural character of the location, just beyond the city boundary."* It is also recorded that "*Stone Villa is a unique building along the North Circular Road, set apart from the neighbouring*

486 See drawing 18-39-PA1-S-0007.
487 Separate from the Conservation Report.
488 DCC Conservation Officers' report.

red-brick buildings by its ashlar construction." The DCC Conservation officers do not record that Stone Villa was added to the list of protected structures specifically in the interest of internal architectural features – though that does not, per se, imply it had no internal features deserving of protection. But as far as can be discerned from the papers, it seems that its external features (perhaps in particular its ashlar front façade) are its features of interest.

363. A view that its external features are its features of interest is at least consistent with Mr Goodbody's observation of the house, cited above, as having an "*air of significance*" - *"an imposing house, though surprisingly modest in size"* and his view that *"The internal fittings and decorative features in the house are also of a relatively modest quality."*

364. DCC's Conservation Officers – both Conservation Architects - cite a 2003 DCC Conservation Report which they do not append, and the Inspector's report does not suggest she had it. It apparently described the house as in good condition in 2003. An oddity of the DCC's Conservation Officers' Report is that they cite the 2003 report photos as clearly showing *"a window (without a location) illustrating glazing profiles and shutters that appear as if they could be from … the 17th C."* They do not comment on how likely this rather diffidently expressed possibility is in a house built in the mid-19th Century on a site shown on the historical maps as unbuilt in the early 19th Century – though, of course, architectural salvage is not a 21st Century novelty. But it seems safe to infer that the text of the 2003 report did not record such a presumably unusual and valuable feature as joinery from the 1600's in a Victorian Dublin villa. Had the 2003 text done so, the DCC Conservation Officers would doubtless have said so. On this basis, DCC's Conservation Officers suggest that Lilacstone should be required to clarify "*whether this joinery is original and whether more exists elsewhere in the building as it has not been identified in the accompanying documentation*". From this we may also infer that neither did the 2003 DCC Conservation Report identify any more such joinery elsewhere in the building. All in all, and while no doubt genuine, this seems a somewhat speculative complaint by DCC's Conservation Officers.

365. DCC's Conservation Officers reported on the planning application – including the "*conversion, renovation and alteration of Stone Villa to accommodate 3 no. apartments*" and *"the widening of the existing vehicular entrance onto North Circular Road".* They noted that the building *"retains a significant amount of important early architectural fabric …"* but as it has been uninhabited for many years its condition has worsened rapidly and considerably, "*especially in recent years, which is highly regrettable*". They are concerned that, unless inhabited, *"…. it may deteriorate past the stage where its significant features can be conserved."* They "*therefore fully support the principle of bringing this Protected Structure back into residential use, providing the new use is facilitated in a manner in which the works are carried out to best possible conservation practice and in accordance with the Architectural Heritage Protection Guidelines. A careful conservation-led repair proposal is welcome."* While this last sentence is ambiguous, it is apparent from their report generally that the DCC's Conservation Officers consider that, at least as yet pending receipt of further information, it is not apparent that the present proposal is "*careful conservation-led".*

366. The DCC Conservation Officers are distinctly critical of the quality of the information supplied in the planning application. They elaborate in some detail on their general observation that

> *"Minimal information regarding the current detail, significance and condition of the protected structure and the proposed works that are to be undertaken has been provided .."*

367. While, to the layperson, the issue of the front boundary wall and gate pillars may not seem hugely important, the DCC Conservation Officers cite §13.4.3 of the Architectural Heritage Protection Guidelines 2011 to the effect that

> *"proposals to remove or alter boundary features could adversely affect the character of the Protected Structure and the designed landscape around it. Widening an entrance or altering railings will alter the scale and visual impact of the gate and gate piers. Relocating a gateway may destroy a carefully designed relationship between the entrance and the main building."*

Specific to the Proposed Development they say that:[489]

- *"The front boundary forms part of the formal approach to the main entrance. It is part of the historic setting and contributes to the mature character of the streetscape, and the setting of the Protected Structure.*
- *"Any alterations to the existing gates and gate piers will alter the appearance and the proportions of the original boundary wall and entrance which would be considered to be a loss of character as well as a loss of historic fabric."*
- *"Limited information regarding the proposal has been provided describing the proposed alterations to the boundary wall."*
- *"We would expect that a set of detailed drawings and a conservation specification and methodology would be provided to offer comfort that the works would be carried out to best conservation practice."*
- *"From a conservation standpoint we do not support this type of development as this proposal would significantly alter the architectural character of the setting and curtilage of the Protected Structure. The principle of dismantling primary fabric and altering it is not good conservation practice and should be avoided."*
- *"I am concerned that permitting this development would result in a further loss of historic fabric as well as in an adverse erosion of the character and setting of the Protected Structure as well as adjoining structures along the road."*

368. More generally, the DCC Conservation Officers express concerns that *".. in the absence of sufficient information describing assessment of the current condition of the structure and further detail of the proposed conservation repair works and new works proposed, there is a risk that historic fabric that contributes to the special architectural interest of this significant building may be lost".*

489 I have altered the order of these extracts.

369. They specify in considerable detail the further information required – including:

- *"A comprehensive and detailed photographic and drawn record of the extant building including internal rooms with historic fabric and architectural features identified on photographs and cross referenced against a set of detailed survey drawings."*

- *"Revised fully detailed information, informed by good conservation practice, on how new work and repairs shall be carried out. This shall include detailed conservation specifications and methodologies …"* including as to the works on the boundary wall.

- *"Repair works of particular note include repair works to extant primary structure – walls, floors, chimneys and fireplaces, roof structure, roof finishes – including slates and lead flashings, ironmongery, rainwater goods, windows, doors, historic joinery, lath and plaster ceilings and walls and decorative plaster features etc. All repair works shall retain and protect the maximum amount of surviving historic fabric in situ."*

They were clearly exercised by the proposal to alter the main vehicular entrance - recommending *"a refusal of this aspect due to the loss of historical character and craftsmanship"*.[490]

370. The Conservation Officers clearly disagreed with Mr Goodbody's view that the Proposed Development would respect the view of Stone Villa from North Circular Road and that there will be minimal impact on its character and setting. They considered (paraphrasing them) that Block A would loom above and to each side of Stone Villa and recommended significant alterations to Block A accordingly.[491]

371. It is clear that the Conservation Officers had significant concerns as to the Proposed Development, but their recommendation was not refusal – save as to the works on the front boundary. It was that further information be sought. It wasn't sought, understandably, as DCC refused permission.

372. The Board's Inspector considers "*Impact on Stone Villa - a Protected Structure*".[492] She notes observations as to the quite unique social history of the house - occupied to relatively recently by four generations of the same family since its construction around 1847. It was occupied as a spacious and elegant family home with a tennis lawn and orchard. She notes the general contents of the submitted Goodbody Conservation Assessment and the alterations to the building over time. She

490 Citing §13.4.3 of the Architectural Heritage Protection Guidelines 2011.
491 They sought to require further drawings that show the parapet height of Block A reduced so that it remains subservient to the parapet height of the front of the Protected Structure and drawings that show the west building line of the proposed apartment block (Block A) be moved lining up behind the Protected Structure.
492 §8.3.

records objectors' concerns as to the Protected Structure. She correctly records[493] the Conservation Officers' support in principle for renovation and their concerns – though one might suggest that she does not quite convey the weight of their criticisms and concerns

373. The Inspector records that the new layout will maintain the external envelope of the building and principal rooms and put one apartment unit at each level – each with generous accommodation while substantially respecting the existing layout and window locations. She is satisfied that

- to require use of Stone Villa as a single residence would be unduly restrictive.
- the new use and alterations are appropriate in principle.
- the proposed layout generally respects the integrity of the structure as far as is practicable for subdivision.

I do not understand any of these conclusions to be disputed.

374. As to site layout and impact on curtilage, she notes that each side of the Villa is kept free from development and the omission of a previously permitted extension further protects the character and integrity of the Villa and the streetscape. The landscape design is informed by the detailed historic OS mapping which will significantly enhance the setting of Stone Villa and its relationship with the public realm and respects its original semi-rural setting. She considers, as to site layout and curtilage, that the protection of their open nature is generous in this city location and mitigates the juxtaposition of Block A to the rear.

375. The inspector records the boundary wall as including three decorative chamfered stone capped pillars and a granite topped externally rendered random rubble stone wall. Noting residents' concerns about the loss of front boundary features in widening the original vehicular access and possible alterations to the pedestrian gate, she said the pedestrian and vehicular wrought iron gates stored onsite should be reinstated – the pedestrian gate to its original position and the vehicular gates could be used to mark a new paved pathway alongside the road entrance.

376. The Inspector notes that "*The structural integrity of the existing house is not fully clear based on the submitted conservation report*[494] *which, while detailed, refers essentially to the superficial observations of the architectural building character and form."* She records that there is not a full record of fireplaces and joinery detail - due in part to the boarding up of the house.

377. The Inspector agrees with the DCC Conservation Officers that details need clarification and she cities their "extensive list" as including; "*detailed survey drawings and full details on how new work and repairs shall be carried out; detailed drawings that co-ordinate the structural intervention, services installation and general upgrade and repairs and in respect of structural integrity and most*

493 Inspector's Report §3.2.4 & 3.2.5.
494 Goodbody Conservation Assessment.

importantly, details on conservation led stabilisation." But she says that, rather than seek further information, such clarification can be achieved by a planning condition. She does not explain why and how that will suffice.

378. Overall, and particularly given the extant permission for an extension to Stone Villa (on which, it is clear, she considers the Proposed Development an improvement) she says,[495]

> *"… while I accept further details need to be clarified which can be done so by condition, I do not consider it reasonable to refuse permission on the basis of impact on a Protected Structure by reason of intervention to the structure or impact on the curtilage."*

379. The Inspector did not draft such a condition (perhaps as she was recommending refusal for other reasons[496]) and the Board did not impose one. Condition 6 of the Impugned Permission bears repeating as it does not seek the clarification envisaged by the Inspector:

> *"6. All works to the protected structure shall be carried out under the supervision and in accordance with the requirements of a qualified professional with specialised conservation expertise (RIAI Grade 2 or higher).*
>
> ***Reason:*** *To secure the authentic preservation of this protected structure and to ensure that the proposed works are carried out in accordance with best conservation practice."*

380. The Board's reason for disagreement with the inspector related to her recommendation to refuse permission. The Board does not address or give any reasons for rejecting her recommendation that information relevant to the protected status of Stone Villa and proposed works thereon be obtained by planning condition.

381. Essentially and as to its disagreement with the Inspector, the Board said no more than that the works proposed to renovate and reuse the protected structure would be "*in accordance with the objectives and policies of the City Development Plan on this well serviced urban infill site*". However all - Mr Goodbody, the DCC Conservation Officers and the Inspector – favoured, indeed in principle encouraged, the proposed renovation of Stone Villa to 3 apartments. I do not understand even Shadowmill to object to that principle. The Board's reason is bland and uninformative as to its disagreement with its inspector (and by extension the DCC Conservation Officers as to the need for information) as to her assertion of a specific need for a condition yielding further information to ensure that that that renovation would be, as the DCC Conservation Officers put it, "*A careful conservation-led repair proposal."* Or, as the Board put it *"To secure the authentic preservation of this protected structure and to ensure that the proposed works are carried out in accordance with best conservation practice."* There is no reasons challenge here, but it is not inconceivable that better

495 Inspector's Report §8.3.7.

496 Her recommendation of refusal perhaps unusually, was not followed by suggested terms of a grant and conditions in case her recommendation was not accepted (as transpired).

reasons might have aided the Board's defence of these proceedings. As it is, the Board cannot rely on reasons not given.

4 - Protected Structure - Pleadings & Arguments

382. Shadowmill pleads a want of jurisdiction to grant permission where Lilacstone failed to provide, as to the Protected Structure, any or adequate detail as to boundary treatment or interior conservation proposals.

383. In particulars Shadowmill pleads[497] the alleged substantive inadequacy of the Goodbody Conservation Assessment – citing its alleged deficiencies as identified by the DCC Conservation Officers and the Inspector's agreement that further information was needed. It pleads that the Board, not having required further information, imposed Condition 6 which "*only required*" supervision of works by a Conservation Architect.

384. Shadowmill pleads[498] "two points":

1. First, it pleads that no drawings "*of any kind*"[499] were submitted of the proposed entrances[500] and no details save their width.[501] It's unclear if the original gates will be reused. The Architectural Heritage Protection Guidelines[502] as to the importance of the boundaries to the quality and character of protected structures is pleaded. The same point is made "mutatis mutandis" as to the interiors of Stone Villa.

   Shadowmill pleads breach of **Article 23(2) PDR 2001** in its requirement that planning applications to develop protected structures *"be accompanied by such photographs, plans and other particulars as are necessary to show how the development would affect the character of the structure"*[503] such that participants in the process were denied opportunity to make observations on the proposed renovations. In submissions, Shadowmill cites also **Articles 23(1)(e) & (f) PDR 2001**[504] as to absence of drawings of the proposed entrances.

497 Grounds §Eb23 et seq.
498 Grounds §Eb27 et seq.
499 That has since proved incorrect.
500 i.e. from the public street to the grounds.
501 An allegation that the developer had furnished additional relevant drawings in the appeal proved misconceived.
502 2011 §13.4.1&2.
503 Art 23(2) PDR 2001. Art 22(5) PDR 2001 requires floor plans of a protected structure but only if it is proposed to be demolished. Art 23 PDR 2001 requires that elevations show the main features of any buildings within the curtilage of the protected structure which would be materially affected by the proposed development.
504 23. (1) Plans, drawings and maps accompanying a planning application ….. shall …… comply with the following requirements
(e) plans relating to works comprising reconstruction, alteration or extension of a structure shall be so marked or coloured as to distinguish between the existing structure and the works proposed,
(f) plans and drawings of floor plans, elevations and sections shall indicate in figures the principal dimensions (including overall height) of any proposed structure and the site, and site or layout plans shall indicate the distances of any such structure from the boundaries of the site.

2. Condition 6, in failing to specify the interior works or make them subject to agreement with the Council, is infirm similarly to Condition 2. And there is no information at all as to the rear rooms. So Condition 6 purports to leave Lilacstone "*at large to make whatever alterations or amendments to the protected structure as it sees fit in the absence of any detail in its application and/or any necessity for agreement post-consent*" and so is ultra vires and void for uncertainty.

385. Notably, there is no plea here of failure by the Board to give any or adequate reasons for their disagreement with the DCC Conservation Officers and the Inspector – inter alia as to

- the adequacy of the information furnished with the planning application for the purpose of enabling a determination of the planning application in favour of a grant,
- the advice to seek further information,
- (in the case of the Inspector) the need for a Planning Condition requiring provision of such information,
- refusal of permission to widen the vehicular entrance,
- alteration of Block A to protect the character and setting of Stone Villa.

386. Shadowmill's assertion that no drawings "*of any kind*"[505] were submitted of the proposed entrances is incorrect. They are illustrated in the "*Proposed Contiguous Elevations*" drawing[506] and their locations, though no detail, are illustrated in the Landscape Masterplan – which does indicate "*Restoration of former pedestrian access with Victorian style gate*". In written submissions Shadowmill says that the "*Proposed Contiguous Elevations*" drawing[507] gives no detail of the proposed entrances through the protected front boundary of the protected structure. It gives no detail as to the height or type of boundary wall, as to the proposed piers, the width of entrances or dimensions of any kind. It does not discharge the obligations imposed by Article 23(2).[508] Nor is there identification or marking of the new proposed entrances so *"as to distinguish between the existing structure[509] and the works proposed"* for the purposes of Articles 23(1)(e). Neither are dimensions of the new entrances depicted for the purposes of Article 23(1)(f). Shadowmill repeats the Conservation Officers' observation as to the importance of the front boundary and that limited information has been provided as to the proposed works on it. Essentially the same points are made as to the interior. Shadowmill's written submissions cite no caselaw on these issues.

387. Shadowmill's argument[510] as to Article 23(2) is that by its Condition 6 the Board agreed with the DCC Conservation Officers and the Inspector that further detail was required, agreed with the Inspector that it could be addressed by condition and yet completely failed in that same Condition 6

505 That has since proved incorrect.
506 Lodged with the Planning Application and exhibited by Mr Goodbody - drawing 18-39-PA1-S-0007-Al BW.
507 Lodged with the Planning Application and exhibited by Mr Goodbody - drawing 18-39-PA1-S-0007-Al BW.
508 The requirement that planning applications to develop protected structures "*be accompanied by such photographs, plans and other particulars as are necessary to show how the development would affect the character of the structure*".
509 i.e. the boundary wall.
510 Pithily put in Day 4 p63.

to procure that such information would be provided. In my view this argument is misconceived. Condition 6 is consistent only with the view that no further detail was required.

388. Lilacstone make the point, which I accept, that pleading non-compliance with the Architectural Heritage Protection Guidelines "*mutatis mutandis*" as to the interiors of Stone Villa, is as deficient as was the pleading of them as the front boundary features. There is no obligation of compliance with those Guidelines.

389. Counsel for the Board, forthrightly but inevitably, accepted the description of the Conservation Officers' criticisms of the "minimal" information provided as "swingeing", "scathing" and "damning".[511] But, courageously, he argued nonetheless that it did not amount to an assertion of inability to assess the effect of the Proposed Development on the character of the structure as "*there is no permission to remove*" any of the historic fabric. Counsel for the Board argued that the permission encompassed works likely to affect the character of the protected structure only if explicitly (and by implication in detail) described in the permission, such that a new permission would be required for anything else. But even he volunteered that that interpretation was "*not wildly practical*".[512] I disagree with the argument, and counsel for the Board didn't convincingly resist when I provisionally intimated my disagreement.

390. While the phrase "*You can't make an omelette without breaking eggs*" is not a legal principle, it has its legal analogue in the principle that a planning permission includes in its scope all works necessary to or necessarily incidental to carrying out the development permitted. **Simons**[513] cites the High Court in **Camiveo**[514] to the effect that the obligation on a developer to carry out a development in accordance with the plans and particulars submitted will extend to any obligations which can be inferred from those plans and particulars. The same principle of interpretation implies that the entitlement of a developer to carry out a development in accordance with the plans and particulars submitted will extend to entitlements which can be inferred from those plans and particulars. In **Heather Hill #1**[515] Simons J cited the logic of **S.40 PDA 2000**[516] for his inference that "*ancillary or incidental works are regarded as part and parcel of the overall development*" permitted. S.40 also refers to works "*necessary to*" the use of the building. It seems to me that the same logic applies more generally to interpretation of planning permissions. True, such arguments must be appraised in given instances with a somewhat sceptical eye given the plans and particulars will have been prepared by, and decisions as to the detail depicted will have been made by, the recipient of the permission – whom it behoves to be clear in its planning application. But, however sceptical the eye, the principle seems to me a good one – as also consistent with the purposive interpretation of a

511 Day 3 p58 etc & p65.
512 Day 3 p65 et seq.
513 Planning Law, 3rd ed'n (Browne) §5-35.
514 Camiveo Ltd v. Dunnes Stores [2017] IEHC 147 at para 47.
515 Heather Hill Management Company clg v. An Bord Pleanála [2019] IEHC 450 (High Court (General), Simons J, 21 June 2019). In turn cited in Heather Hill Management Company CLG v. An Bord Pleanála [2022] IEHC 146 (High Court (Judicial Review), Holland J, 16 March 2022).
516 Limit of duration of permission.

planning permission commended in **Camiveo**[517] and in **PKB**.[518] The main purpose of a planning permission is to actually permit, insofar as planning law can do, the permitted development to proceed. While the possibility of such an interpretation is not to be ruled out, an interpretation to the effect that it does not suffice, as a matter of planning law, for that purpose of actually permitting the proposed development is undesirable as rendering it illusory and ineffective.

391. It is perfectly plain from the photographs and the description in the Conservation Report of both the condition of Stone Villa and the intended works that very significant works indeed are inescapable in making this derelict, damp and likely structurally defective, mid-Victorian building, formerly a single home, habitable as 3 separate apartments to modern regulatory standards. Such inescapable works are encompassed in the Impugned Permission – otherwise the Impugned Permission would be illusory and ineffective. And, as such works are permitted by the permission, they are permitted whether or not they would, if done other than pursuant to a permission, be or not be exempted development. That accords with the principles of common-sense, contextual, purposive and pragmatic interpretation of planning permissions by the court and as a matter of law (see the High Court and Court of Appeal in **Camiveo**[519] and the High Court in **Ardragh**[520]) and with **XJS**[521] principles. It follows that the Conservation Officers' criticisms did amount to an assertion of inability to assess the effect of the Proposed Development on the character of the protected structure.

392. As an aside, it may be useful to point out that the foregoing is an analysis of the scope of works permitted by a permission. It does not address the possibility of immaterial deviation from a permission as deviations, ex hypothesi, are not permitted works. The law as to material and immaterial deviation only comes into play if works outside the permitted scope of works are in question.

393. The Board replies to Shadowmill that the adequacy of information provided with a planning application is a matter of planning judgement and expertise for the Board, save in the case of very specific requirements.[522] It says it is free to disagree with the Conservation Officers. It cites the Planning Report submitted with the planning application, the Goodbody Conservation Assessment, the Contextual Elevation Drawing and the DCC Conservation Officers' Report as a sufficient basis of information for its decision. I do not understand the Board's inclusion of the "*scathing*" and "*damning*" DCC Conservation Officers' Report in this list. Taken as a whole, it lends no support to the Board's decision other than for the general agreement that renovation to apartments is desirable – though only if "conservation-led".

517 Camiveo Ltd v. Dunnes Stores [2017] IEHC 147 §47 – approved in Camiveo Ltd v. Dunnes Stores [2019] IECA 138 (Court of Appeal, Costello J, 9 May 2019) §§33 & 49.
518 PKB Partnership v. An Bord Pleanála [2022] IEHC 542 (High Court (Judicial Review), Ferriter J, 3 October 2022)
519 Camiveo Ltd v. Dunnes Stores [2019] IECA 138 (Court of Appeal, Costello J, 9 May 2019).
520 Ardragh Wind Farm Ltd v. An Bord Pleanála [2019] IEHC 795 (High Court, Simons J, 22 November 2019).
521 Re X.J.S. Investments Ltd [1986] I.R. 750.
522 For such an exception, the Board cites Kelly v Cork County Council & Kelleher [2013] IEHC 122 as to breach of the express requirement Article 23(1)(a) to indicate the location of "bored wells" on site or layout plans. In fact the decision also criticised the absence of depiction of a nearby stream. However, it is clear from the decision that it was decided on other grounds and the observations as to compliance with the regulations in this respect were understandably brief and not reasoned. It does not really assist in present circumstances.

394. The Board correctly says that, despite suggesting that more information be sought by way of condition, the Inspector concluded that the information supplied sufficed to assess the impact of the development on the character of the Protected Structure. It cites Condition 6 as sufficing to secure best conservation practice – which standard it mandates. When read with Condition 1 the Board says, Condition 6 does not leave Lilacstone "*at large*" with a "*free hand*" to make whatever alterations or amendments it sees fit to the Protected Structure. It cites by analogy **People Over Wind**[523] - presumably for the proposition that a condition which cannot be met may stymie the permitted development[524] and for its consideration of the proper scope of Boland conditions.[525]

395. Beyond what the Impugned Permission permits, the developer cannot in reliance on Condition 6, the Board says, do anything other than what would be exempted development within S.57 PDA 2000. To put that another way, the Board says that if the Developer wants to do anything which would affect the character of the structure it must seek planning permission for such works.[526] I have taken a different view, for reasons stated above, of the interpretation of the Planning Permission. In this respect, reliance on Condition 6 is the minor issue: the major issue is that the Developer has, as I have said, permission to transform Stone Villa into 3 apartments to modern standards. This, at least, is a case in which the facts and photos are compelling. Transforming Stone Villa into 3 apartments cannot be done without very significant works: yet it is permitted by the Impugned Permission.

396. Lilacstone says the width of both gateways can be determined from scaled plans and drawings submitted with the application – including the landscape masterplan and in particular, in the Contextual Elevation Drawing[527] which also depicts their pillars – all of which Mr Goodbody's affidavit describes as to be replicas of the existing pillars at the vehicular entrance. (As far as I can see this is the first time that assertion made explicit). It says the drawings satisfy the Article 23(1)(f) requirement that plans and drawings indicate "*the principal dimensions*" of the Development. The existing and proposed floor plans of the protected structure show the works that are proposed to the protected structure, including locations of partitioning, layout of rooms, new doorways, blocking up of doorways and provisions of bathrooms. The Conservation Assessment provides more detail in written form. Like the Board, it submits that adequacy of information is a matter for the expert judgement of the Board as to whether it enables assessment of the impact on the character of the protected structure.

523 People Over Wind v An Bord Pleanála [2015] IECA 272.
524 §45.
525 §59 et seq.
526 Day 3 p52.
527 18-39-PA1-S-0007-A1BW.

4 - Goodbody Affidavits - 28 March 2022 & 2 September 2022 - for Lilacstone

397. As to the complaint of a lack of survey of to the rear return of Stone Villa, Mr Goodbody says that, due to collapsed rotten floors, it was securely closed off from the rest of the building and none of it was accessible. Mr Goodbody says it would be usual in such an early 19th-century building that the original fit-out of the return, including decorative details, would be of a lower standard than in the main part of the house, the return being more utilitarian and less likely to be seen by visitors. So, he says, not seeing it did not significantly affect the overall conservation assessment.[528]

398. As to the complaint of a lack of information as to the proposals for the front boundary, Mr Goodbody says the works were shown on a "Proposed Contiguous Elevations" drawing prepared by the architects and lodged with the planning application.[529] It proposed a wider vehicular entrance, which would only require moving the western gate pier slightly to the west and removing a small part of the boundary wall to do so. It also shows that the proposed pedestrian entrance piers would be replicas of the existing piers at the vehicular entrance. The pedestrian entrance will be widened slightly to fit "*Victorian style gate*" as provided for in the Landscape Masterplan drawing submitted with the application.

399. Surprisingly, Mr Goodbody does not in his affidavits address the allegations of inadequacy of information as to the condition of, and intended works on, the interior of Stone Villa, or the criticisms of the DCC Conservation Officers. He merely and blandly asserts that the condition of, and intended works on, the interior are "*referred to*" in the Goodbody Conservation Assessment and are "*shown*" in the proposed ground floor plans. The resulting inference is that, no doubt properly, he considered that he could not usefully address those issues.

4 - Protected Structure - Discussion & Decision

400. The plea here is not of unreasonableness or failure to give adequate reasons. It is of:

- uncertainty of Condition 6 and a repeat of the case made against Condition 2.
- breach of the regulations as to the information to be furnished with the planning application such as to deprive the Board of jurisdiction to grant the Impugned Permission.

401. It cannot be denied – in fairness it is not denied - that, here, the Board has had regard, at least in the relatively undemanding ordinary sense of that phrase, to the protected status of the structure. If nothing else, Condition 6 permits of no other conclusion. However, its capacity to rely on its Inspector's report as recording its decision is limited significantly by its implicit but clear rejection

528 In his second affidavit, Mr Goodbody corrects a typographical error in his first – clarifying that the limitations on his survey due to the inaccessibility of the return did not "significantly" affect the overall conservation assessment. He does not explain what he means, in actual terms, by the word "significant".
529 He exhibits drawing 18-39-PA1-S-0007-A1 BW.

of her view that further information was required as to works on the protected structure, if only by planning condition.

402. The overarching regulatory requirement[530] applicable to a planning application for development of a protected structure is that of Article 23(2) PDR 2001 to supply *"such photographs, plans and other particulars as are necessary to show how the development would affect the character of the structure".* What this requires in a given case will proceed from, and vary according to, its particular circumstances - including the specific interests for the protection of which the structure is protected and the nature and extent of the proposed development. Hence, whether the necessity is satisfied and the possibility of seeking further information, are for the planning decision-maker in the exercise of its discretion and planning judgment. That general (and good) practice as to the information to be included in planning applications as to protected structures may have built over time into expectations of particular plans and details should not disguise that position in law. Though it will, in a general sense, reflect that position in law.

403. The detail required by **Article 23(2)** and the necessity it invokes clearly constitute a requirement designed to enable the substantive decision to be made on the planning application. A planning permission for works on a protected structure cannot be granted unless the decisionmaker has understood "*how the development would affect the character of the structure*". Any other view would be inconsistent with the statutorily mandated protection of the structure. So, if the necessary information has not been furnished, its being furnished cannot be deferred by condition until after permission has been granted. On the other hand, it is clear that further information may be sought only where it is "*necessary to enable the planning authority to deal with the application*" – *"to decide upon the merits of the application on planning grounds*". And "*once a planning authority has all the information or sufficient information necessary to decide on a planning application, it should not seek further information"* for any other purpose.[531]

404. Notable in this context is the Inspector's view that she did *"not consider it reasonable to refuse permission on the basis of impact on a Protected Structure by reason of intervention to the structure or impact on the curtilage."* The Board clearly accepted that view.

405. As stated above, Shadowmill's argument as to Article 23(2) PDR 2001 is that, by its Condition 6, the Board agreed with the DCC Conservation Officers and the Inspector that further detail was required and agreed with the Inspector that it could be obtained by Condition and yet completely failed in that same Condition 6 to procure that such information would be provided. I disagree. In light of the law as to seeking further information as set out above, the Inspector's view that further detail could be obtained by condition rather than by further information request as the DCC Conservation Officers recommended, necessarily implies that the Inspector and the Board disagreed

530 EIA considerations apart.
531 See generally Simons on Planning Law, (3rd Ed'n (Browne) §3-207 et seq & The State (NCE Ltd) v Dublin County Council [1979] I.L.R.M. 249 at 251.

with the DCC Conservation Officers as to the necessity for a request for further information before the application could be decided. They clearly considered that they had enough information to enable a decision to grant permission. Whatever else might be said of the Inspector's view that additional detail should be sought by condition, it is at least consistent with her view that she had enough information on which to decide the planning application. Indeed, DCC had come to the same view – albeit with the opposite substantive result.

406. But the Board's Condition 6, far from endorsing the Inspector's view that further detail should be obtained by condition, implicitly but clearly rejects that view. As to the conversion of Stone Villa to 3 apartments, it seems to me that it was for the Board to decide whether the floor plans and other accounts of the proposed works submitted with the planning application sufficed in the circumstances to allow a decision to be made on the planning application. Those circumstances no doubt including the highly dilapidated condition of Stone Villa as described and depicted in the Goodbody Conservation Assessment. It was in principle open to the Board to disagree with the Council's Conservation Officers and its Inspector in this regard. Clearly, the Board has jurisdiction to disagree with them and inadequacy of reasons for such disagreement is not pleaded.[532] But that is not the end of the matter.

Works on Stone Villa

407. Condition 6 in effect puts the conservation architect retained by the developer in the same decision-making position as to works on the protected structure, as that in which Condition 2 as to landscaping puts the Council. In pleading that Condition 6, in failing to specify the interior works or make them subject to agreement with the Council, is infirm similarly to Condition 2 and having regard to the plea of uncertainty, I understand Shadowmill to invoke the line of authority in **Boland**[533] and in **Kenny**[534] cited above as to the vires to impose planning conditions leaving matters of detail to agreement with the planning authority. I understand Shadowmill's point to be, in part, that what might be merely matters of detail as to other buildings and so fit for later agreement with the planning authority, are not matters of detail as to protected structures. I accept that general proposition. One may add that the word "*limited*" in the phrase in Boland, "*limited degree of flexibility*", sheds appreciable light on the concept of matters of detail. And they are to be considered in light of the degree of protection of protected structures mandated by the CIE case. Indeed the very word "*protected*" and the word "*special*" used in Part IV Chapter 1 PDA 2000 as to protected structures, shed further light. In general terms that seems to me a good point, though whether good in this case requires further consideration.

408. In any event, Shadowmill complains that Condition 6 does not require any agreement with the planning authority of works to the protected structure. They are left to the decision of

532 This issue was the subject of discussion with counsel for Shadowmill on Day 2 p73 et seq.
533 Boland v. An Bord Pleanála [1996] 3 I.R. 435.
534 Kenny v An Bord Pleanála & Ors [2001] 1 I.R. 565.

Lilacstone's conservation architect which whose "*requirements*" the developer must comply. It requires that Lilacstone's conservation architect impose his/her will on his/her client as to what works it may or may not do.

409. If nothing else, **Boland,**[535] **Kenny**[536] and **People Over Wind**[537] are not authority for conditions leaving matters of detail to the decision of a professional advisor to a developer – they are authority only for leaving such matters to the decision of the planning authority. And even if conditions leaving detail to the decision of the developer's professional advisors may be intra vires, it necessarily follows from those cases that such conditions must be subject to, at very least, the same limitations as agreements leaving matters of detail to the decision of a planning authority.

410. As recorded above, in **Kenny**[538] citing **Boland**,[539] McKechnie J, importantly for present purposes, stated that whether a planning condition leaving "*technical matters, or matters of detail"* for agreement with the planning authority "*is intra vires is a matter of degree and depends on the nature of the matter left for resolution, the resolving of which must have regard to the nature and circumstances of each particular application and development."*

411. Two things at least, are notable in this observation by McKechnie J: first, that it describes an issue of jurisdiction, necessarily for the Court to decide. Second, that it represents one of those situations in which the Court cannot escape exercising at least some degree of what might otherwise be considered planning judgement proper to the Board rather than the court. I need not interrogate its underlying rationale to accept the view of McKechnie J, but it may proceed from the principle that the Board cannot be allowed to determine the scope of its own jurisdiction to impose a Boland Condition, which is a jurisdiction limited to technical matters and matters of detail.

412. And in this regard McKechnie J justifies conditions leaving matter to further agreement in part in that the Board is entitled "*To have faith and confidence in the planning authority's role <u>given its statutory function and responsibility.</u>"*[540] It seems to me important that the Board's entitlement to have faith and confidence in the planning authority proceeds from the planning authority's "*statutory function and responsibility".* That "*statutory function and responsibility"* includes a quasi-judicial independence in making planning decisions and a responsibility for upholding the public interest in proper planning and sustainable development. It also includes specifically public duties:

- as McKechnie J said, to further the faithful, true and core implementation of the permission.
- to protect protected structures.

535 Boland v. An Bord Pleanála [1996] 3 I.R. 435.
536 Kenny v An Bord Pleanála & Ors [2001] 1 I.R. 565.
537 People Over Wind v An Bord Pleanála [2015] IECA 272.
538 Kenny v An Bord Pleanála & Ors [2001] 1 I.R. 565.
539 Boland v. An Bord Pleanála [1996] 3 I.R. 435.
540 Emphasis added.

413. In some contrast, the conservation architect envisaged by Condition 6 as decision-maker regarding the "*high degree of protection*"[541] to be afforded the protected structure will be retained by Lilacstone. He/she will not have the same "*statutory function and responsibility"* and, without impugning his/her integrity and while he/she will bound by duties of independence, he/she will simply not be in the same position vis-à-vis Lilacstone and the public interest in protecting Stone Villa as would be the Planning Authority. It is no disrespect to professional advisors to developers to say that that is why we have planning authorities and the Board to make planning decisions in the public interest rather than entrusting planning decisions to the professional advisors of developers. It is no criticism of or imputation against Lilacstone or any conservation architect it might retain for purposes of Condition 6 to argue that it is ultra vires the Board to, in effect privatise, and privatise to a person to be retained and remunerated by the developer, the performance of what are public law functions of protection of protected structures. Clearly, at some level and to some degree, reliance on professionals retained by the developer is inevitable but, accepting that the distinction is not red-line, more as to implementation of works than as to their specification.

414. The "*nature and circumstances*" here include that Stone Villa is a protected structure and entitled to the high, wide and very significant degree of protection required by the statutory scheme – as identified by Clarke J in **CIE v An Bord Pleanála**.[542] It does not take an expert, on viewing even the sparse photographic record in the Goodbody report and the floor plans available, to discern that the circumstances of this case clearly disclose, despite the intention to minimise interference with the existing floor layout, the necessity of very significant works indeed on the interior and exterior of Stone Villa to bring it from near-dereliction and likely structural deficiency into its intended use.

415. It does not seem to me to be consistent with that required degree of protection to leave it to the developer's conservation architect to decide, for all we know on a day-to-day basis as works proceed and in resultant circumstances of urgency and pressure (of various kinds), whether particular, and arguably necessary, works may proceed. Restoration and preservation can be expensive and slow. Though not inevitable, it would be entirely unsurprising if the interests and practical implications of protection of architectural heritage prove to be at odds with the immediate financial and other interests of the developer – hence statutory protection. Such decisions may have potentially significant cost - and other - implications for the conservation architect's client. Such decisions would also be made in the knowledge, inter alia, that in establishing the nature, scope and content of works required or to be countermanded, the client could be subject to enforcement process for breach of a planning condition by way of failure to comply with the conservation architect's requirements. And any enforcement would be dependent in part on the clarity of and record of those requirements and their communication to the developer. Even with the best will and professionalism of both architect and developer, that invidious position could easily tax the independence of the most conscientious conservation architect.

541 Córas Iompair Éireann and Another v An Bord Pleanála and Another [2008] IEHC 295.
542 [2008] IEHC 295.

416. Further, a "*compliance agreement*" with a planning authority as to a Boland condition is susceptible to judicial review as the decision of a public authority – "*The function of the planning authority in agreeing the points of detail is very limited and is subject to judicial review by the High Court."* [543] Simons additionally records that compliance agreements, must be placed on the public file.[544] Hedigan J in **Pearce**[545] went so far as to say that *"The decision that a condition upon which a Planning Permission was granted, has been complied with is a decision of equivalent importance to that of the Planning Permission itself. It should be recorded in a manner that reflects this significance."*. In contrast, it must be doubted that the private and likely piecemeal decisions of the conservation architect would be likewise susceptible to judicial review (either in law or as a matter of practicality) – though that is not to suggest that there would necessarily be no remedy, if only in arrears of the relevant act or omission.

417. These issues of publicity and remedy are of some importance given the public cannot participate in the process of resolving the matters of detail in question and yet has a valid interest in ensuring that the agreement of those details does not exceed the scope of the authority conferred by the planning permission and more generally has a valid interest in the public value of and amenities conferred by protected structures. In that light, it seems to me a particularly cautious view must be taken as to the scope of the matters of detail to be left to the developer's conservation architect.

418. Condition 6 is not challenged for want of reasons given by the Board. But their absence deprives the Board of argument it might otherwise have made in favour of Condition 6. Neither does the Inspector give reasons for her envisaging a condition as opposed to requiring further information as the DCC Conservation Officers recommended - beyond baldly stating that a condition would suffice. Indeed, she does not say what was to become of that information once provided on foot of her envisaged condition or how it might inform or result in the regulation of the works to be done. I have considerable doubt that the condition envisaged by the Inspector was for determination of the works by the developer's conservation architect - as opposed to by agreement with the Planning Authority. I think it likely she envisaged production of the information by way of a compliance submission as a basis for such agreement. But perhaps I am wrong, and we will never know for sure as she did not provide a draft condition.

419. What we are left with in order to apply McKechnie J's test of vires to Condition 6 is the inspector's substantive account[546] of the information provided and outstanding. As recorded earlier, but worth repeating, she notably records that:

- The structural integrity of the existing house is not fully clear based on the submitted conservation report which, while detailed, refers essentially to the superficial observations of

543 Simons on Planning Law, 3rd Ed'n (Browne) §4.422, Arklow Holidays Ltd v An Bord Pleanála [2006] IEHC 15. Pearce v Westmeath County Council [2016] IEHC 477.
544 Simons on Planning Law, 3rd Ed'n (Browne) §4–411 citing Pearce v Westmeath County Council [2012] IEHC 300.
545 Pearce v Westmeath County Council [2012] IEHC 300.
546 §8.3.6 & 8.3.7.

the architectural building character and form. She notes external cracking and extensive repair work required. This observation falls to be understood in light of Mr Goodbody's disavowal of having done a structural survey and is stated (and understandable) inability to diagnose the cause of the bowing of the front façade). Indeed, it falls to be understood also in light of Mr Goodbody's, no doubt proper, view that the methodology for the "*serious intervention*" required on the exterior of the building. Including to address the bowing of the front façade, not least given the uncertainty of its cause, be made the subject of a planning condition or addressed via a S.5 PDA 2000 declaration – either eventuality involving referral to the Planning Authority rather than being left to the decision of a conservation architect retained by the developer.

- She agrees with the planning authority that further details of how refurbishment can be precisely achieved while protecting "*the features*" needs further clarification.

- Notably and by way of elaboration on her agreement with the DCC Conservation Officers, the Inspector says:

  "The planning authority in its assessment refers to an extensive list of further details that are required including; detailed survey drawings and full details on how new work and repairs shall be carried out; detailed drawings that co-ordinate the structural intervention, services installation and general upgrade and repairs and in respect of structural integrity and most importantly, details on conservation led stabilisation."

The last phrase - "*most importantly, details on conservation led stabilisation*" – is striking.

420. In the end, and despite the phrase "*further details*" above I cannot see how, in substance, this last paragraph of the inspector's report, in its own terms and as relating to a protected structure entitled to the high, wide and very significant degree of protection required by the statutory scheme, can be regarded as describing mere points of detail in the sense envisaged by McKechnie J. As I have observed, his standard does involve the court in some assessment of issues of degree which relate to planning judgement. While the court cannot shirk that test, it should be cautious in its application. However, on the particular facts of this case, I am satisfied to draw the conclusion I have drawn.

421. However, the matter goes further. The Inspector differs with the DCC Conservation Officers as to means – whether further information should be sought by a request or by condition. But it seems to me important to note that, as to the substance of the information required, this element of the Inspector's report in effect agrees with the DCC Conservation Officers. I refer to my account of their report above and their view that "*minimal information*" had been provided.

422. For reasons explained above as to the scope of works permitted, I am not convinced by the argument that the public interest in Stone Villa as a protected structure is protected in that Lilacstone is enabled by Condition 6 only to do internal works which would be exempted

development within S.57(1) PDA 2000 as works which would not materially affect the character of the structure (incidentally, for good or ill – and whether particular works are one or the other may be arguable).

423. I have not overlooked the possibility, leaving aside that the issue has been left to the decision of the developer's conservation architect rather than DCC, and leaving aside that the subject matter left over is not as to mere detail, that by its reason for Condition 6 the Board met the Boland requirement to set criteria by reference to which agreement on points of detail might be reached. The reason stated in Condition 6 is *"To secure the authentic preservation of this protected structure and to ensure that the proposed works are carried out in accordance with best conservation practice."* This is far too generic and prompts far too many questions as to what is the substance of "*best conservation practice"* as bearing on this specific protected structure to constitute adequate criteria for Boland condition purposes. By way of example, one may contrast the quite specific criterion set in **People Over Wind**[547] as elucidated by Hogan J: *"The Board's statement of principle is crystal clear, namely, that no silt or sediment whatever should enter the run-off thus contaminating the up-stream watercourses."* One may add that the very specificity of the criteria set in the Boland condition assists in reducing the issues for agreement to matters of detail. That has not been achieved by Condition 6 in this case.

424. In my view Condition 6 is non-complaint with the Boland/Kenny criteria and so is to be quashed as ultra vires. What is left for decision are not matters of detail as that concept relates to protected structures and to the particular facts of this case. The same point can be made through the prism of uncertainty and by way of a finding of non-compliance with Article 23(2) PDR 2001. The Impugned Permission will be quashed on that account.

425. I therefore need not decide if the Impugned Permission should also be quashed as ultra vires merely for leaving decision-making power to the developers' conservation architect. Though, as will have been seen, I have very considerable doubts indeed as to the vires of that approach, at least in circumstances in which appreciable information is outstanding as to works on a protected structure.

The Boundary & Entrances

426. I need not decide if the Impugned Permission should also be quashed as to the adequacy or otherwise of the information provided as to boundary, gateways and pillars. However, against the possibility of remittal of this matter to the Board or that the case will go elsewhere, it may assist to essay some views. The following can be said, obiter:

547 People Over Wind v An Bord Pleanála [2015] IECA 272 §60.

- Mr Goodbody's report contains no record of the existing pillars and no description of the works to be done to them apart from the movement of one.

- I refer to Mr Goodbody's two largely uninformative photographs of the boundary wall. It is difficult to see why he provided no photograph of each of the existing pedestrian and vehicular entrances and their pillars and informative photographs of the boundary wall.

- I have the Contextual Elevation Drawing in the large - A1 - format in which it was submitted with the planning application.[548] As to the details of depiction of the front boundary wall however, that large format is not as reassuring as one might imagine. That boundary wall is seen on one only of a number of elevations on that sheet and that elevation spans a considerable distance from the far side of the Luas line to the east of Stone Villa to the far side of the pair of semi-detached houses to the west of Stone Villa. The net result is that the depiction of the boundary wall and pillars on that elevation is very small, and it is difficult to discern in any detail what is intended. While, as the drawing title indicates, that elevation is useful for contextual purposes, there is no "close up" proposed front elevation of Stone Villa and its boundary. Indeed, I understand it is the only, or at least the "best", depiction of the proposed boundary works.

However, all that said, the Contextual Elevation Drawing is to a scale of 1:200 and so complies with Article 23(1)(b) PDR 2001 which prescribes 1:200 as the minimum acceptable.

427. It is not satisfactory to rely on Mr Goodbody's retrospective reassurance on affidavit that the Contextual Elevation Drawing shows that the proposed pedestrian entrance piers would be replicas of the existing pillars at the vehicular entrance when his report did not describe or depict those existing pillars and given the small scale of the drawing provided. His reassurance to that effect was not before the Board.

428. Both the drawing and the report are far from models of their kind having regard to the importance of boundaries to protected structures as recognised in the Architectural Heritage Guidelines. One would certainly expect better, and no planning decision-maker could be criticised for regarding them as insufficient – as the DCC Conservation Officers clearly did. However, the Contextual Elevation Drawing is to the required scale and considered together, the two poor photographs of the boundary and the drawing just about suffice to depict the relatively simple structures and dimensions of the boundary wall and pillars. Of course, that does not prevent the Board, on any remittal, from seeking further information in that regard if it thinks it necessary or, if not, from imposing a condition as to the submission to DCC of a better record of the boundary and of the proposed works.

548 I am unclear if it is properly called A0 or A1 format, but nothing turns on that.

OVERALL DECISION

429. For the reasons set out above, I will quash the impugned permission as lacking an objective basis, on the papers before the Inspector and the Board, on which to conclude by way of Preliminary Examination that there was no real likelihood of significant effect by reason of destruction of bat roosts in Stone Villa. The Impugned Permission is defective in this regard and will be quashed on that account as, to adopt the wording of Shadowmill's plea, wrong in law, by reason of a failure to properly assess whether there is any real likelihood of significant impacts on bats entitled to strict protection.

430. It will also be quashed for the reasons set out immediately above as to the proposed works on Stone Villa as a protected structure.

431. I reject the complaint as it relates to the omission of Block B.

432. I am provisionally of the view that Shadowmill should have its costs but will await argument in that regard.

433. I will list the matter for mention only on 17 April 2023

David Holland
31 March 2023